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May 1 '32

CITY COURT REPORTS.

BY
EDWARD JACOBS,
COUNSELLOR AT LAW.

VOLUME II

KFX
2005.8.A4
C. 103
V. 2

NEW YORK:
PRESS OF HENRY M. TOBITT.
1889.

Rec. Dec. 19, 1902.

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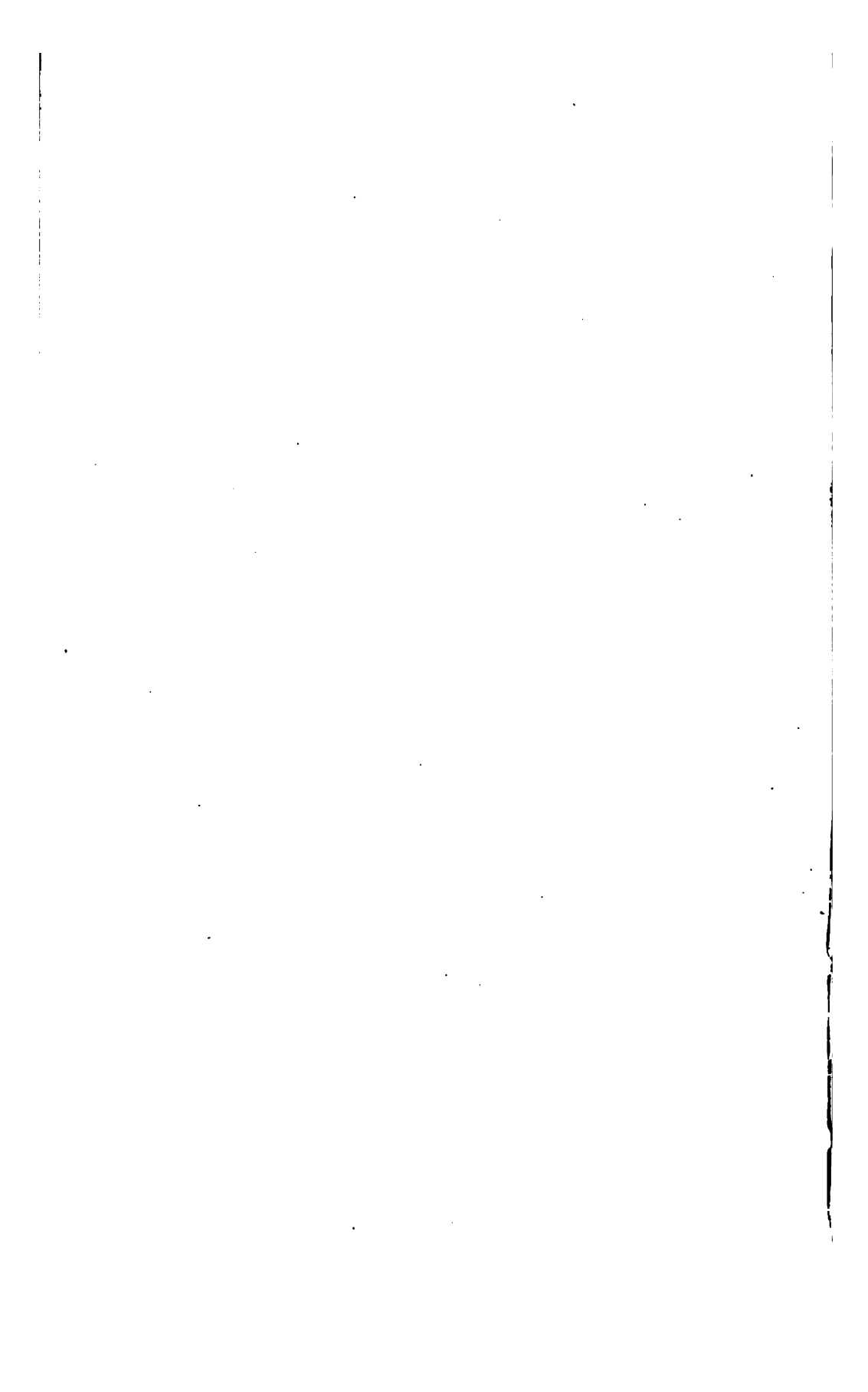
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CITY COURT REPORTS.

New York Marine Court.

Trial Term—May, 1877.

THE BANK OF METROPOLIS *against* CHARLES
JACOBS.

Protest of check—books of dead notary as evidence. When the notary who protests a note dies, the protest may be proved by producing his notarial book, proving its character, that the handwriting is that of the notary, and that it was a book kept for the purpose of entering protests, &c.

Trial by the court without a jury.

MCADAM, J.—The plaintiff sues upon a bank check drawn by the defendant, bearing date December 15, 1875, whereby he requested the West Side Bank to pay to the order of S. Goldsmith on January 5, 1876, \$438.77. Goldsmith indorsed the check and delivered it to the plaintiff.

The defendant, Jacobs, defends upon the ground that the check was not presented at the West Side Bank at maturity, and that notice of dishonor was not given to him as drawer. The notary public, under his hand and official seal, certifies that said check "was, on the 5th day of January, 1876, duly presented to the teller of the West Side Bank, and payment thereof demanded and refused." Whereupon he, the said notary, duly protested the same. This certificate is by statute made presumptive evidence

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of the facts therein contained (3 *R. S.* 6 ed. 445, § 36). The check was not entitled to days of grace (2 *Id.* 1163, § 29), and was properly protested on January 5. The service of notice of protest upon the indorser was proved: *First*. By showing the notary's death. *Second*. By producing his notarial book, proving its character, that the handwriting was that of the notary, and that it was a book kept for the purpose. This evidence was competent (*Sutton v. Gregory*, *Pea. Add. Cas.* 150; *Poole v. Dicus*, 1 *Bing. N. C.* 649; *Holmes v. Smith*, 16 *Me.* 181; *Halliday v. McDougall*, 20 *Wend.* 81; *Gawtry v. Doane*, 51 *N. Y.* 90; *Bank v. Cooper*, 1 *Har. [Del.]* 10; *Wetherell v. Claggett*, 28 *Md.* 465; *Bodley v. Scarborough*, 6 *Miss.* 729; *Duncan v. Watson*, 10 *Miss.* 121; *Armes v. Middleton*, 23 *Barb.* 571; *Brewster v. Doane*, 2 *Hill*, 537).

It has even been held that the entries of a deceased bank clerk, made in the register of a notary in the usual and ordinary course of business, were properly received in evidence. The entries were made in a book kept for the notary for that purpose by the clerk, whose duty it was to transact the particular business and to make the entries. The entries made by the deceased clerk were deemed the best attainable evidence under the circumstances, as they were made under such circumstances as to furnish a strong presumption that they were true, and they were received to prevent a failure of justice (51 *N. Y.* 90).

In *Welsh v. Barrett* (15 *Mass.* 380) the book of the messenger of the bank, not a notary, who was dead, in which in the course of his duty he entered memoranda of demands and notices to the promisors and indorsers upon notes left in the bank for collection, was received as evidence of a demand of the maker, and notice to the defendant as indorser, of a note so left for collection.

In *Nichols v. Goldsmith* (7 *Wend.* 162), the memorandum of a deceased cashier of a bank—who frequently notified indorsers of non-payment of notes in the name of

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the acting notary of the bank—that on a certain day he sent notices by mail to an indorser, was held to be competent, and *prima facie* sufficient evidence to charge the indorser.

In *Shelden v. Benham* (4 *Hill*, 129), it was held that the memorandum of a deceased teller of a bank, made in the usual course of his employment, is competent evidence in proving a demand by him of the maker of a note and notice to the indorsers, and this, whether he attended to the business on the retainer of a notary, or as part of his duty to the bank.

The Revised Statutes (2d ed. p. 212, marg. p. 284, vol. 2, § 48) provide that "Any note or memorandum made by a notary public in his own handwriting, or signed by him, at the foot of any protest, or in a regular register of official acts kept by him, shall, in the cases specified in the last section, [death or insanity of the notary] be presumptive evidence of the fact of any notice of non-acceptance or non-payment having been sent or delivered at the time and in the manner stated in such notice or memorandum."

The defense is technical, and has been sufficiently overcome by the proofs, which are sufficient to charge the defendant whether he received the notice or not (51 *N. Y.* 93). Judgment will therefore be rendered for the plaintiff for \$480.03, the amount of the check, with interest and five per cent. allowance.

Entries in book of deceased witness. See the case of the *Town of Bridgewater v. Town of Roxbury*, 35 *Alb. L. J.* 66, in which the authorities on the subject are collated.

Mailed and not received. A notary's notice, proved to have been mailed by the notary, and not to have been received by the indorser, may be presumed not capable of production, and the contents may be proved by parol (*Greenwich Bank v. De Groot*, 7 *Hun*, 210).

Whitten v. Chester.

Marine Court.

*Trial Term—October, 1877.*THOMAS WHITTEN *against* DANIEL W. CHESTER.

The authority of the master of a vessel to confine an offending seaman on board the ship by putting him in irons, when his conduct and a just regard to discipline and safety render it necessary, is unquestionable. But the master's act must not be done in an unusual, wanton or cruel manner, or he will be liable for such conduct, although the right to confine the seaman existed.

Trial by the court without a jury.

G. M. Curtis, for plaintiff.

Leroy S. Gove, for defendant.

McADAM, J.—The plaintiff shipped as an able seaman on board the *Dauntless*, an American vessel, of which the defendant is master, for a voyage from San Francisco to this port. During the voyage, and while upon the high seas, the plaintiff became refractory, exhibited an angry temper and made threats against the life of the mate and carpenter of the vessel, and upon one occasion had a scuffle with one Kelly, a fellow-seaman. For these acts of misconduct the captain had the plaintiff handcuffed and then confined in what is called the booby-house of the vessel, a small room less than five feet high, and not large enough therefore to permit an ordinary man to stand erect. It was without air, except such as found its way through the joints of the doorway leading to it. The plaintiff complained of this treatment, said he was suffocating, and finally broke open the door and made his exit. He was immediately seized, his legs were manacled, and thus bound hands and feet, he was returned to his place of confinement and there imprisoned until the arrival of

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the vessel at this port—a period of eighteen days ; and for this imprisonment the plaintiff brings action to recover damages.

The authority of the master to confine an offending seaman on board the ship by putting him in irons, when his conduct and just regard to good discipline and safety render it necessary, is unquestionable. But the power exists only in cases where the circumstances are urgent and require its exercise. The master is not clothed with judicial authority to sentence seamen to punishment for their offenses. The law has conceded that authority to the regular tribunals of the country, acting according to the ordinary forms of justice, and upon a trial of the facts by jury. The evidence adduced satisfies me that the plaintiff, while at sea, misbehaved by using threatening language and acting in a mutinous manner, that the master was in consequence justified in putting him in irons, if he honestly believed that such imprisonment was necessary for the enforcement of discipline and the safety of the vessel.

I have no doubt that the master believed the plaintiff was dangerous and ought to be put in confinement, and acted under such belief ; and the only question which remains to be determined is whether the master's act, legal in itself, was not done in an illegal, unusual and cruel manner, so as to make him liable for the unnecessary and illegal excess of punishment inflicted. Upon this branch of the case I hold that the manner of imprisonment, and particularly the place selected for it, were under the circumstances manifestly improper. Humanity requires that a person, even deservedly imprisoned, shall during his confinement have at least standing room, and a fair supply of light and of fresh air. These necessities were denied to the plaintiff, and his punishment was therefore unnecessarily cruel, oppressive and inhuman, and for its excessive severity the defendant is liable, because all punishments which are unjust or unusual are discountenanced by law.

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Judgment will therefore be rendered against the defendant for \$100, and costs.

Marine Court.

General Term—November, 1877.

WILLIAM H. CROMWELL, RESPONDENT, *against*
GEORGE L. BURR, APPELLANT.

Composition in bankruptcy. Regularity of proceedings. Tender. Conditions. The resolution for composition in bankruptcy and its approval by the court, followed by payment, operate *ipso facto* as a discharge. When jurisdiction attaches everything done within the power of that jurisdiction will, when collaterally questioned, be held conclusive. Where the creditor refuses to receive the payment, the necessity for a tender is dispensed with. If a tender is refused on a specific ground, no other can be urged against it.

Abram Wakeman, for appellant.

E. P. Wilder, for respondent.

MCADAM, J.—The plaintiffs sue upon contract to recover \$1,670.52. The defendant in bar of the action sets up proceedings in bankruptcy by composition had in the district court of the United States for the southern district of New York. The proper forms were observed up to and including the time when the final resolution of compromise was passed. The resolution was approved of by the court, and its ratification, if followed by payment of the proper amount, operated *ipso facto* as a discharge of the claims of all creditors whose names, residences and amount of demands appear in the statement. (*U. S. Laws* 1874, ch. 390; 18 *Stat. at L.* 178,

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§ 17); for no other discharge is necessary (*Wetts v. Lamprey*, 16 *Bankr. Repr.* 205; citing *Re Becket*, 12 *Id.* 201; *Re Trafton*, 14 *Id.* 508). The plaintiffs' names, residences and the amount of their demand, appear in the statement, and their claim is barred, unless, by neglect to pay or tender payment, the defendant has lost the benefit of his proceeding.

The plaintiffs make several technical objections to the composition proceedings, and insist that this court shall inquire into their regularity and pass upon their sufficiency. We decline to do so, on the ground that these matters cannot be considered in a collateral proceeding like the present. The supreme court of the United States, in *Michaels v. Post* (21 *Wall.* 425), said of certain objections to bankruptcy proceedings: "Jurisdiction is certainly conferred upon the district courts in such a case, if the petition presented sets forth the required facts, and the court upon proof of the service thereof, finds the facts set forth in the petition to be true; and it is equally certain that the district court has jurisdiction of all acts, matters and things to be done, under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings." And at p. 426, the court held: "As the district courts are created by the act of Congress which confers and defines their jurisdiction, it follows that decrees rendered in pursuance of the power conferred are entitled to the same force and effect as the judgments or decrees of any domestic tribunal, so long as they remain unreversed or not annulled."

In *Cornett v. Williams* (20 *Wall.* 249), the same court said: "Jurisdiction is the power to hear and determine. To make the order in question requires the exercise of this power. It was the business and duty of the court to ascertain and decide whether the facts were such as called for that action. The question always arises in such proceedings—and must be determined—whether

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upon the case as presented, affirmative or negative action is proper. The power to review or reverse the decision as made is clearly appellate in its character, and can be exercised only by an appellate tribunal in a proceeding had directly for that purpose. It cannot and ought not to be done by another court, in another case, where the subject is presented incidentally, and a reversal sought in such collateral proceedings. The settled rule of law is, that jurisdiction having entered into the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud. Every intendment is made to support the proceeding. It is regarded as if it were regular in all things, and irreversible for error. In the absence of fraud, no question can be collaterally entertained as to anything lying within the jurisdictional sphere of the original case. Infinite confusion and mischiefs would ensue, if the rule were otherwise." The district court having acquired jurisdiction of the bankruptcy proceedings, every subsequent proceeding is presumed to be regular, and its decision whether correct or otherwise, upon every question properly arising in the case, is binding and conclusive until reversed on appeal (*Smith v. Engle*, 9 *Chic. Leg. N.* 46). Assuming, therefore, as we must, that all the proceedings in the United States court are regular, the only question necessary for us to determine is whether the defendant has by any act or neglect lost their benefit. The defendant did not pay the plaintiffs the amount awarded them by the composition, to wit: forty cents on the dollar, and the determination of this appeal depends upon whether the amount was properly tendered or tender thereof legally waived so as to preserve defendant's rights. The tender was made, but accompanied by conditions which rendered it nugatory, and it will be assumed, therefore, that no tender was made. This is putting it as strongly as the plaintiffs can ask. We will

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next pass to the question of waiver. The case shows that the plaintiffs refused to receive any money on the composition, and said that whatever was paid would be credited on general account, and not otherwise. This dispensed with any tender on the part of the defendant. (*Murray v. Roosevelt*, *Anth. N. P.* 138; *Van Pelt v. Woodward*, 2 *Sandf. Ch.* 643; *Stone v. Sprague*, 20 *Barb.* 409; *Blewitt v. Baker*, 58 *N. Y.* 611; *Haynes v. Am. P. L. I. Co.*, 69 *N. Y.* 435; *Lawrence v. Miller*, 86 *N. Y.* 131; *Dana v. Fielder*, 1 *E. D. Smith*, 463; *Slingerland v. Morse*, 8 *Johns.* 474; *Everett v. Salters*, 15 *Wend.* 474). The tender having been refused on the specific ground that the plaintiffs would receive nothing under the composition, they cannot now raise any other objection which, had they stated then, might have been obviated (*Hull v. Peters*, 7 *Barb.* 331; 10 *Abb. Pr. N. S.* 484; 21 *N. Y.* 547). Thus, in *Duffy v. O'Donovan* (46 *N. Y.* 223), it was held that a tender having been refused, because not made in time, objection could not afterwards be taken that the tender was not made in money (see also *Mitchell v. V. C. M. Co.*, 67 *N. Y.* 282); and a check is a good tender, if not objected to on the ground that it is not money (*Becker v. Boon*, 61 *N. Y.* 317). But for the plaintiffs' positive and unequivocal act, the defendant might afterwards, and in time, have made an unconditional tender, which would have obviated all objection to its sufficiency.

The proceedings in the United States court, being regular, should be upheld (*Exp. Hemmingway*, 26 *Law T. R.* 278), all the other creditors having assented to them.

Having been regularly discharged by the composition proceedings, and the plaintiffs having refused to accept their dividend, the defendant was under no obligation to make an idle tender; nor was he obliged to deposit the money in court; this procedure is necessary only to save costs.

It follows that the trial judge erred in directing a ver-

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dict for the entire amount demanded. It should have been directed for the forty per cent. only.

Judgment reversed and new trial ordered, unless the plaintiffs consent to reduce the judgment in accordance herewith, in which case the judgment as modified will be affirmed, without costs.

ALKER, J., concurred.

Affirmed by the New York common pleas, March, 1878. The court relieved the plaintiffs from their stipulation, and allowed them to take the new trial awarded.

City Court.

Trial Term—May, 1880.

THOMAS BEATTY, BY GUARDIAN, *against* JOHN H. HESSMAN.

A youth of thirteen years, employed to feed a wood-chopper, was injured while adjusting a belt belonging to the machinery of the establishment. It was out of the line of his special employment, and the direction was given by a fellow-workman. *Held*, that the employer was not liable.

See note at end of case, on *Infants in Dangerous Employments*, and as to *Who are Fellow-Workmen*.

Motion for new trial on the minutes.

J. M. Lyddy, for plaintiff.

C. S. Spencer, for defendant.

MCADAM, J.—The plaintiff, a youth of thirteen years, was engaged by the defendant, a kindling-wood

Beatty v. Hessman.

dealer, to feed one of the wood-choppers in his establishment. While the employment of such a youth in a hazardous business that constantly exposes him to unsuitable and dangerous risks, is reprehensible, and may render the employer liable for any casualty which may happen in the usual course of such employment, the evidence clearly shows that the injuries of which the plaintiff complains were received while attempting to adjust certain belting connected with the machinery of the wood-yard. It was no part of the plaintiff's duty to attend to the machinery, nor was he commanded to adjust the belting by the defendant, or by one temporarily occupying his place as any foreman, superintendent, or (as some books use the term) middleman. The direction was given by a fellow-workman, named Dorsch, through whose agency the damage was caused. The painful injuries received by the plaintiff are such as juries are only too willing to redress with liberal compensatory damages. This sentiment may be just when the culpable parties are before the court; but I have been unable to find any solid legal ground to fix the responsibility upon the defendant for injuries received by the plaintiff out of the line of his special employment, and by the exclusive negligence of a fellow-workman (See *Murphy v. Smith*, 19 *C. B. N. S.* 360; *S. C.*, 12 *L. T. N. S.* 605; *King v. Boston R. R. Co.*, 9 *Cush.* 112; *Gartland v. Toledo R. R. Co.*, 67 *Ill.* 408; *Brown v. Maxwell*, 6 *Hill*, 592; *Nashville R. R. Co. v. Ellis*, 1 *Coldw.* 611).

The complaint was, therefore, properly dismissed, and the motion for a new trial must be denied.

Children falling down Stairway.

In *DONNELLY*, by guardian, *v. KELLY et al.*, *City Court, Trial Term, March, 1887*, the following decision was filed:

McADAM, Ch. J.—The plaintiff, a boy three years of age, accompanied his mother to the defendants' store. While the mother was engaged looking at goods, the boy wandered from her and fell down

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the stairs leading from the store to the basement. They were in the rear of the store, at one side thereof, where they appropriately belonged. It was a place customers were not obliged to pass or repass. The childish curiosity of the boy must have attracted him there. The structure was a legal one; it was not a well-hole or a hatchway, nor was it inherently dangerous. It was the ordinary stairway to be found in all well-constructed buildings. It is not uncommon for children to fall down stairs, if not watched, and this duty falls on the parent, and cannot be cast on a stranger. If the mother had exercised proper care the boy would not have been allowed out of her presence, and her negligence is imputable to him (*Sher. & Red. on Neg.* § 48). Stairways are not dangerous but necessary appliances. The case is at best one of inevitable accident. It certainly furnishes no ground for the application of any legal principle which imputes negligence to the defendants.

Complaint dismissed.

Dangerous Employment of Children.

L. 1876, c. 122,—prohibiting the use or employment of any child in any business or vocation injurious to the health or dangerous to the life or limb of such child,—was repealed by implication by the passage of section 292 of the Penal Code (*Ryan v. Buchanan*, 37 *Hun.*, 425). This section of the Penal Code does not prohibit the employment of children in a dangerous "business or vocation," but only in a dangerous "practice or exhibition" (*Id.*). In order to create a liability of an employer under L. 1876, c. 122, § 3, the "business or vocation" in which the child is employed must be of the character mentioned in section 1 and 2,—an employment either vicious in itself, or which partakes of the character of an amusement (*Hickey v. Taaffe*, 99 *N. Y.* 204. Followed, reversing a judgment for plaintiff—a minor—in an action for injuries received at a steam punching-machine, where the court charged the jury that if the machine was dangerous, the defendant was liable, *Cooke v. Lalanc & G. M. Co.*, 90 *N. Y.* 649. See also *Hayes v. B. & D. Manuf. Co.*, 102 *N. Y.* 648).

The master is bound to advise the servant of any risks to which he is subject by the working of a dangerous machine. In respect to inexperienced children, the duty would go so far as to warn the servant of risks which the intelligence of the child would prevent his comprehending or fully understanding. A person of mature years, who accepts an employment in or about the management of a dangerous machine, assumes the risks of the employment, and so does

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a minor who is fully instructed or fully understands the dangers of the employment (*Buckley v. Gutta Percha Co.*, 41 *Hun*, 450). It is a wrongful act of the master, when an employé of the master, who is entrusted with the management of a machine, puts a boy without experience at work at a business and upon a machine which a man of ordinary sagacity would know to be perilous (*Union Pacific R. R. Co. v. Fort*, 17 *Wall. U. S.* 553 ; 21 *U. S.* [*Williams' Reprint*] 739).

In *Bartonskill Coal Co. v. McGuire* (3 *Macq. H. L.* 300, 311), Lord CHELMSFORD, in speaking of an injury to a young girl from exposure to machinery in the building where she was employed, says : "It might well be considered that, by employing such a helpless and ignorant child, the master contracted to keep her out of harm's way in assigning to her any work to be performed."

One who put a boy of fifteen in charge of a wild and fractious horse in a place where trains of cars, moved by steam, were approaching in opposite directions, was held liable for an injury to the boy, in consequence of the horse being frightened and becoming unmanageable (*Hill v. Gust*, 55 *Ind.* 45).

The general obligation of the master to give information to one who, from immaturity or otherwise, would not be likely to be understood and appreciate it, is affirmed in *Sullivan v. India Manuf. Co.*, 113 *Mass.* 396.

Whether a Foreman takes the place of the Master or whether he is to be regarded as a Fellow-workman.

Whether a foreman takes the place of the master or is to be regarded as a fellow-workman, depends upon whether he is an *alter ego*, that is, one who to all practical purposes represents the master so as to make his act the act of the master.

Alter ego. Another's self, another like me in appearance or behavior.

Alter idem. Precisely similar, another self.

The rule is thus laid down by the court of appeals. A master is not responsible to an employee for the negligent acts of a competent and proper foreman, to whom there has been no delegation of power and control of the business or a branch thereof, but who is simply charged with special duties, performing them under the direction of the master, the latter continuing general control and supervision. It is only where the master withdraws from the management of the business, intrusting it to a middleman or superior servant ; or where, as in case of a corporation, the business is of such a nature, that the general management and control thereof is necessarily com-

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mitted to agents, that the master can be held liable to a subordinate for the negligent acts of one thus acting in his stead (*Malone v. Hathaway*, 64 N. Y. 5).

An act or duty which a master is bound to perform for the safety and protection of his servant, cannot be delegated so as to exonerate him from liability for any injury to the servant caused by an omission to perform it, or by its negligent performance; and this, whether the mis-feasance or non-feasance is that of a superior or inferior officer, agent or servant, to whom the doing of the act or the performance of the duty has been committed. The act or omission is that of the master also, irrespective of the question, whether it was or was not practicable for the master to act personally, or whether he did or did not do all that he personally could do to secure the safety of the servant (*Fuller v. Jewett*, 80 N. Y. 46).

The liability of a master for an injury to an employé, occasioned by the negligence of another employé, does not depend on the grade or rank of the latter, but upon the character of the act in the performance of which the injury arises. If the act is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance; but if the act is one pertaining only to the duty of an operative, the employé performing it, whatever his rank or title, is a mere servant, and the master is not liable to a fellow-servant for its improper performance (*Crispin v. Babbitt*, 81 N. Y. 516).

McC., plaintiff's intestate, was employed in the yard of defendant at H. P. to assist the yardmaster L.; he was hired by L. and was under his control and supervision. While McC. was engaged, by direction of L., in attaching a damaged car standing on the track in the yard to another car, L. negligently signaled to an engineer, whose train stood upon the track, to back the train, which he did, without signal or warning, and in consequence McC. was crushed between the cars, receiving injuries causing his death. In an action to recover damages,—*Held*, that the yardmaster was to be deemed a fellow-servant with the deceased as to all acts done in the range of the common employment, except those done in the performance of some duty which defendant owed to its servants; that the act was not one of that character; and that, therefore, defendant was not liable (*McCoaker v. Long Island R. R. Co.*, 84 N. Y. 77).

Where the master delegates to another entire control over a particular branch of his business, the person to whom such power is delegated stands in the place of the master as to all duties resting upon him to his servant, and his acts or omissions relative thereto

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are the acts and omissions of the master himself (*Sheehan v. New York Central R. R. Co.*, 91 *N. Y.* 334).

An employer does not undertake absolutely with his employes for the sufficiency or safety of the implements and facilities furnished for their work, but only for the exercise of reasonable care in that respect; and where injury to an employe results from a defect in the implements furnished, knowledge of the defect must be brought home to the employer, or proof given that he omitted the exercise of proper care to discover it. Personal negligence is the gist of the action (*Devlin v. Smith*, 89 *N. Y.* 476. See also *Olson v. Clyde*, 32 *Hun*, 425).

New York Marine Court.

Trial Term—June, 1880.

JOSEPH WOELFER *against* JOSEPH HEYNEMAN,
PRESIDENT OF ZION LODGE, No. 38, I. O. F. S. OF L

Death benefits. Benevolent society. Where a member paid his dues to an officer of the society at a time and place other than that specifically designated and appointed for such purpose in the by-laws, and the same are paid into the treasury of the society, and the fact entered on its minutes which were read and approved of at its next meeting,—*Held*, that the payment was legal and preserved the member's status.

Where a subordinate lodge is charged with the duty of reporting certain facts to the Grand Lodge as a condition precedent to imposing on the Grand Lodge the duty of assessing and collecting death benefits, and the subordinate lodge refuses to perform this duty, the person to whom it is owing may maintain an action against the subordinate lodge for such breach of duty, and the sum which the Grand Lodge would have raised if such duty had been performed,—to wit, \$1,000,—is the legal measure of damages.

MCADAM, J.—The defendant's society is a member of and operated by, and in accordance with, and under the government of two other and different voluntary organizations, known as District Grand Lodge No. 1, of the State

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of New York, of the I. O. F. S. of I., and the Grand Lodge of the United States of the I. O. F. S. of I., and is governed by and is subject to a constitution and by-laws, which said constitution and by-laws, and the several articles thereof, are for the government of the said Grand Lodge and for all subordinate lodges working under its authority, and are followed by and adopted as part of the laws and government of the defendants.

The objects of the society, pertinent to this inquiry, are contained in the following articles of the constitution and by-laws, to wit:

"Article VII. Provisions for widows, orphans, etc.

"Section 1. In case of the death of a member in good standing, in any lodge of the I. O. F. S. of I., the sum of \$1,000, collected by regular contributions from all the lodges of the Order, shall be paid to the wife of the deceased, if living, and, if dead, to his children; if there are none, then to such person or persons as he may have formally designated to his said lodge prior to his decease, or to his legal heirs.

"Section 2. The secretary of the lodge wherein a death occurs shall send to the grand secretary of the Grand Lodge of the United States a certificate signed by him, the president, and vice-president, with the seal of the lodge affixed thereto, stating the full name and residence of the deceased, the date of his death, and that he at that time was a member in good standing, also the name and residence of the brother who was appointed by the lodge to receive and collect the money.

"Section 3. On receipt of such certificate, the grand secretary shall give notice to all the lodges of the Order forthwith, also shall publish such death in two Jewish papers (those having the largest circulation), one in the City of New York and one in Cincinnati.

"Section 4. Every lodge of the Order shall, within thirty days from the time of receiving such notice from the grand secretary, pay and remit, for each and every

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one of its members appearing on their roll-list, to the brother designated by the lodge in which the brother died, such sum as the Grand Lodge of the United States may have determined at its last yearly general meeting.

"Section 5. As soon as the sum of \$1,000 is received, the lodge shall, by their trustees or other proper officers, pay the same to the widow, children, or any other person duly entitled to receive the same, and obtain from such person or persons receipts in duplicate form, signed by the parties receiving the same, and duly attested by said trustees, and shall forward immediately one of said receipts, with a schedule of the amounts received from the various lodges, and all surplus over and above the amount of \$1,000 to the grand secretary.

"Section 6. A committee of three, appointed at the yearly general meeting, shall take charge of the surplus money so received during the fiscal year, shall invest the same at interest, and account for it to the next annual general meeting of the Grand Lodge of the United States, who then shall make the proper disposition of the same.

"Section 7. The survivors of a deceased brother of the Order are only then entitled to the said benefit, if the deceased, on the day of his death, shall not have been over four months in arrears for his dues and assessments to his lodge."

Siegmund Woelfler was, on and before June 2, 1873, a member of said Zion Lodge. Whether he was in good standing as such member is the first question presented for determination. He paid all of his dues and fines, and in every way observed and performed the rules and regulations of the several by-laws and constitution of the society.

The defendant contends that, because the last payment (the one which preserved his proper status in the society) was made to an officer of the society at a time and place other than that specifically designated and appointed for such purpose in the by-laws of the society,

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the said Siegmund Woelfler ceased to be a member in good standing, and thereby lost his right to the benefits which would otherwise have become payable to his legal representatives.

This objection is answered by the admitted fact that the payment so made was, by the officer who received it, paid into the treasury of the society, and was passed by the proper financial officer to the credit of said Woelfler, and an entry of the fact was recorded in the defendant's minutes, which were approved of at the next regular meeting of the society.

These affirmative acts obviate the objection presented, and preclude it from now questioning the propriety and binding force of the payment.

This payment made Woelfler a member in good standing at the time of his death, and entitled his legal representatives to all the benefits agreed to be paid to the representatives of deceased members.

The society did other acts in recognition of the fact that Woelfler was entitled to all the observances and privileges belonging to good membership, but these need not be here enumerated in view of what has been said before. The defendant's society agree, in and by the constitution, that the sum of \$1,000, collected by regular contribution from all lodges, shall be paid: First. To the wife of the deceased member, if living. Second. If the wife be dead, to his children, if he leave any. Third. If he leaves no wife nor child, then to such person or persons as he may have formally designated to his lodge prior to his death. Fourth. If he make no designation, then to his legal heirs.

The deceased left no wife nor child, and made no designation, so that the \$1,000 became payable to his father (the present plaintiff), whom I decide to be his legal heir within the meaning of the provision just mentioned.

The defendant, recognizing the fact aforesaid, through its secretary, sent to the secretary of the Grand

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Lodge of the United States, a certificate, complying with section 2 of the constitution in all but one particular, to wit, that the deceased was a member "in good standing" at the time of his decease, with the name of a brother appointed by the lodge to receive the money.

The Grand Lodge, in consequence of this omission, (which was purposely made) refused to collect and pay over the money necessary to pay and discharge the \$1,000 aforesaid, holding that it was not legally bound to do so, because the required certificate had not been furnished. The Grand Lodge was right in this construction of the constitution (see sections 2, 3, and 4).

The defendant's society refused to give the required certificate, and the plaintiff, in consequence, brings this action to recover the damages resulting from the plain breach of the duty imposed upon it by section 2 (*supra*).

That the defendant owed this duty to the plaintiff, as the legal heir of the deceased, is clear (*Lawrence v. Fox*, 20 N. Y. 268), and by its failure to perform it the plaintiff has been damaged to the extent of \$1,000, which he would have received if it had been performed.

There is no question that the Grand Lodge had the ability to collect and pay over the sum agreed (\$1,000), and that it would have performed this formal duty faithfully, if it had obtained the certificate which the defendant wrongfully withheld.

The damages resulting from the breach are therefore fixed and certain. Whether the plaintiff had or has any other remedy for the money is a question not necessary to consider.

He is certainly entitled to the ordinary remedies furnished by the law for the redress of wrongs. He has chosen to bring this action, which is an appropriate form of remedy under the circumstances, and is entitled to a verdict for the sum of \$1,000, with interest from the time when the plaintiff would have received that sum, if the

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defendant had discharged the legal duty which he owed to him, making together the sum of \$1,465.

As to suing Grand Lodge, see *Eberle v. Kauffeld*, 2 *How. Pr. N. S.* 488.

The judgment was subsequently paid.

Marine Court.

Trial Term—February, 1882.

HERMANN PHILLIPS *against* SOLOMON BARNETT.

While a parent is not liable for the tortious or negligent acts of his minor children, he is liable if he negligently leaves a loaded revolver in an unlocked bureau drawer in a room in which his minor children are allowed to play, if one of them, not knowing the danger, takes the pistol and inflicts injury upon the person or property of another. The ground of liability is the negligence of the parent.

On June 15, 1879, the plaintiff went to the residence of the defendant to give the latter's twelve-year-old son lessons in Hebrew. The defendant kept a loaded pistol in an unlocked drawer of his bureau in the room where his children were allowed to play. The pupil playfully took the pistol out of the drawer, and, not knowing the consequences, pointed it at his mentor—the plaintiff. It went off like a flash, the bullet striking the plaintiff, making a deep indentation in the flesh and doing him bodily harm.

The action was against the parent for \$2,000 damages, alleged to have been suffered in consequence of the injuries.

T. D. Robinson and Isaac L. Sink, for plaintiff.

L. Wallack and Albert Cardoza, for defendant.

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Upon the conclusion of the evidence Judge MCADAM declined to dismiss the complaint, and, after reviewing the evidence, charged the jury that if, under the circumstances stated above, they found that the defendant was negligent in placing a loaded revolver in an unlocked bureau drawer within the reach of children too young to understand its danger, and that such negligence resulted in injury to the plaintiff, the defendant was liable for the consequences; that while a parent is not liable for the tortious or negligent acts of his minor children, he was liable for his own want of care where it resulted in damage to another; and that if he failed to observe the caution which an ordinarily prudent man would have exercised under similar circumstances, his negligence was established; that the ground of liability was the carelessness of the parent; and that the existence or absence of negligence was a question of fact for their determination. The jury found in favor of the plaintiff for \$500 damages.

The judgment was subsequently paid.

Liability for Torts by Infants.

The general rule is that an infant is responsible for his torts as any other person would be (*Cooley on Torts*, 183; *Sherman & R. on Neg.* § 57; *Tift v. Tift*, 4 *Denio*, 175; see cases collated in *Washington L. Rep.* November 20, 1886; *MacPherson on Infants*, marg. p. 481; *Tyler on Infancy*, § 123; *Schlossberg v. Lahr*, 60 *How. Pr.* 430.)

When act of Infant Chargeable to Parent..

The possessor of a dangerous agency is bound to guard it against the acts of children who, unconscious of its injurious tendencies, may unintentionally inflict damage upon the persons or property of others.

[Loaded fire-arms are dangerous weapons, and it is negligence to place them in the hands of persons incompetent to use them, or to leave them exposed where children, through curiosity or otherwise, may be likely to become possessed of them (*Dixon v. Bell*, 5 *Mwile & S.* 198; *Cooley on Torts*, 441); but the action must be on the special case, because the injury is indirect, and does not happen

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until some secondary agency has intervened (*Cooley on Torts*, 441). A child too young to understand the effects of exploding powder, and who injures himself therewith, may have his action against the person who sold it to him (*Carter v. Towne*, 98 *Mass.* 567). In *Poland v. Earhart* (23 *Reporter*, 111), the supreme court of Iowa held that an action would not lie against the seller of a fire-arm to a minor who is injured in handling it. The action was by the parent for loss of services.

New York City Court.

Special Term—April, 1888.

DELATOUR *against* BRICKER ET AL.

Where one or more defendants are sued upon a joint or several liability, and one answers and the others make default, the entire costs may be taxed against all the defendants.

MCADAM, J.—Where two or more defendants are sued upon a joint liability, and one answers and the others make default, the entire costs may be taxed against all the defendants (*Catlin v. Billings*, 18 *How. Pr.* 511), and it makes no difference whether the liability be joint or several (*Warner v. Ford*, 17 *How. Pr.* 54).

MASON, J., in the last cited, said: "I do not see that it could make any difference if the contract on which the suit is brought were *joint and several*, when the plaintiff sues them jointly, for he is entitled to joint judgment. As the defendants have assumed a joint liability, the plaintiff is entitled to insist upon a joint judgment, and it does not lie with one of the parties to say that joint liability shall be severed by his putting in a separate defense, and if the other parties, who do not wish to defend, desire to be relieved from costs, they should pay the demand. As sections 454, 455, 456, 1,205, 1,932 of the Code of Civil Procedure were not invoked by either party before judgment, it is

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not necessary to pass on their effect, even if they would have been otherwise applicable. They do not in this case prevent the application of the former practice.

Motion to set aside judgment or to retax costs denied.

Marine Court.

Trial Term—May, 1883.

SUYDAM, AS LANDLORD, *against* WOOD, AS TENANT.

Where one without title or permission enters into and builds upon the lands of another, he becomes a squatter, and may be proceeded against as such; or, if he maintains the possession thus obtained by force, he may be proceeded against for forcible detainer. What constitutes adverse possession.

MCADAM, J.—The person proceeded against is in error in supposing that this controversy presents a disputed title, for the petitioner has established a perfect paper title from the time Peter Waldren died seized of the property in 1771 to date, while the person proceeded against has not a vestige of title. He has no deeds or writings, has paid no taxes or assessments, and has done none of those acts or things which an owner of property is naturally expected to do. The defendant's entry was not under color of title nor under claim of right (8 *Cow.* 589; 70 *N. Y.* 147, and cases cited in brief of respondent in 74 *N. Y.* 241); but was tortious in its inception. There is, therefore, no foundation for a claim of title by adverse possession. Besides, the continuity of the alleged possession was broken (Code, § 2245; 7 *Hun*, 616; 68 *N. Y.* 659); and when the defendant built upon the premises he became a squatter, within the meaning of the term as employed in the Code (§ 2232). If it be conceded that the defendant entered into possession without force, there is

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enough in the acts of the defendant to show a preconceived design to maintain possession by force, and this is sufficient to warrant the finding of a forcible holding out (60 *How. Pr.* 439). The defendant admitted to the witness Stoutenburgh that he had no title. In fact, he never claimed that he had any, and the admission made to Stoutenburgh is consistent with the defendant's acts prior to the time when he undertook to and did seize upon the petitioner's property, and by an unusual number of men erected a building upon it in a remarkably short space of time. Title to the property of another cannot be gained in that way, nor can an attempt to gain title in any such form be countenanced by any court of justice.

Judgment will therefore be rendered in favor of the petitioner, that the defendant and all persons claiming under him be removed from the premises, and that the petitioner be put into the full possession thereof, and that the petitioner recover of said defendant the sum of fifty dollars as the costs of this proceeding (*Code*, § 2250). The petitioner must prepare the final order in accordance herewith and submit the same, together with the necessary warrant, and they will receive my fiat.

What constitutes Adverse Possession.

See *McAdam's Landlord and Tenant*, 2 ed. 438. A person cannot acquire title to land, which is unenclosed, unoccupied and unimproved, by taking a deed thereof from one not the owner and then going upon the land and asserting his ownership, or making occasional entries upon the land for grass or sand (*Price v. Brown*, 101 *N. Y.* 669).

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New York City Court.

*Special Term—May, 1883.*HAHN *against* ANCHOR STEAMSHIP CO.

A corporation cannot conceal itself to avoid the service of process.

MCADAM, J.—The merits of this application are only secondary to its novelty. That a corporate body can conceal itself with intent to avoid the service of process, not only imputes marvelous ingenuity to the officers of the steamship company, but somewhat exaggerates perhaps their hiding and obscuring capacity. The application for a substituted service of the summons is declined on the ground that the legislative sense of civil remedies is not yet liberal enough to extend the process to the case presented.

New York City Court.*Special Term—May, 1882.*MANN *against* SANDS ET AL.

Where a person employs a broker to buy or sell a particular kind of stock, the latter becomes a fiduciary in regard to the moneys which come into his hands; but if moneys be deposited with the broker from time to time as margins, the fiduciary relation necessary to authorize an arrest does not exist between the broker and the customer.

MCADAM, Ch. J.—The general rule is that if a person employs a broker to buy a particular stock, and gives him the money to pay for it, the broker becomes a fiduciary in respect to both stock and money. If he employs a

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broker to sell a particular stock belonging to him, the broker becomes a fiduciary in respect to such stock and its proceeds, and for any breach of duty toward the employer the broker is liable to arrest. But if money be deposited from time to time with a broker by a customer to cover any temporary rise or fall in the value of stocks not owned and paid for by the customer, but which are to be purchased and sold on his account on what is technically known in the Street as "margins," and settlements are had by balances struck, the relation thus formed becomes that of a debtor and creditor, and a failure by either party to pay the balance due does not furnish the other with a ground of arrest. This, like every other loan or deposit, may to a limited extent imply a trust and confidence, but it does not necessarily create that fiduciary relation which subjects the party who makes default in paying such balance, to arrest (see 6 *Robt.* 502; 15 *How. Pr.* 97; 6 *Duer*, 696; 1 *Hun.* 639).

In this case it does not appear that the plaintiff had possession of any of the stocks purchased or sold by the defendants, and the transaction, so far as the papers disclose, falls within that class of cases in which an arrest is not authorized. The motion to vacate the order will therefore be granted.

See *Waters v. Marrin*, 12 *Daly*, 445.

New York City Court.

Special Term—May, 1883.

HUNT *against* PEAKE.

Statutes of limitations as applicable to legal representatives or heir at law.

Section 392 of the Code of Civil Procedure does not apply to a case where an executor or administrator qualifies shortly after the

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death of the decedent. When the statute of limitations has once attached, it is not revived by this section.

MCADAM, J.—Prior to section 392 of the Code of Civil Procedure, the statute of limitations began to run only from the grant of letters testamentary or of administration, and this upon the ground that until the granting of letters there was no person in being capable of suing, and in consequence the limitation was in some cases indefinitely postponed (5 *Barb.* 393; 6 *Lans.* 296; 61 *N. Y.* 497). Section 392, which is new, changed this indefinite rule, by providing that for the purpose of the statute of limitations “letters are deemed to have been issued within six years after the death of the testator or intestate.” If, therefore, letters have in fact not been issued, and the action is so barred by this new provision that no executor or administrator who subsequently qualifies, can in consequence maintain an action, “Any of the next of kin, legatees or creditors, who at the time of the transaction upon which it might have been founded, was within the age of twenty-one years . . . may, within five years after the cessation of such a disability, maintain an action to recover damages by reason thereof; in which he may recover such sum . . . as he would have received upon the final distribution of the estate, if an action had been seasonably commenced by the executor or administrator.” This section does not apply to a case like the present, where an administratrix qualified within two months after the death of the intestate, and by her neglect to prosecute, the statute of limitations has once legally attached, for there is nothing in section 392 (*supra*) which revives or transfers the lost cause of action to the next of kin or legatees. The cause of action passed to the administratrix as soon as she qualified, and she holds legal title to it still, unless it be lost, as before suggested, by her neglect to sue, and its consequent discharge by the statute. The neglect of the administratrix might

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have been sufficient to charge her personally with the debt, upon her final accounting before the surrogate, but it does not furnish the plaintiff with a cause of action against the defendant.

Demurrer sustained.

See also *Viets v. Union Nat. Bk.*, 101 N. Y. 564.

New York Common Pleas.

General Term—May, 1883.

MARY O'CONNELL, PLAINTIFF AND RESPONDENT, *against*
GEORGE D. HILLYARD, DEFENDANT AND APPELLANT.

The defendant, who is a builder, was employed by Mrs. Salter, the tenant, to make certain repairs to the house she occupied. The defendant sent some of his men to make such repairs as Mrs. S. directed. While making the repairs, the men sent by the defendant opened a grating in front of the basement door, and the plaintiff, a servant employed by Mrs. S., fell through into the cellar below and was severely injured. The question of negligence was submitted to the jury, as was also the question whether the men were acting under the immediate direction of the defendant or of Mrs. S. The jury having found for the plaintiff,—*Held*, that the verdict must be sustained. That the men who opened the grating were employees of the defendant, and he is liable for their negligence.

Appeal from an order of the general term of the marine court affirming a judgement entered on the verdict of a jury upon a trial had before Mr. Justice MCADAM.

The facts are : Shortly prior to the happening of the accident, Mrs. Salter had an interview with the defendant, who is a builder, in which she said that she wanted certain repairs done to her house, No. 36 West nineteenth street,

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in the city of New York. The defendant sent his employees to do the repairs, giving them directions what to do and telling them to do such other repairs as Mrs. Salter might order. During the progress of the work, and in order to avoid carrying dirt through the house, the men opened a grating in front of the basement door and the passageway from the basement door to the street. The plaintiff, a servant employed in the house by Mrs. Salter, saw the grating open on Saturday. On Sunday she saw that the grating was closed, and on Monday morning, when she let the men in, she saw it closed.

She afterwards went to the gate to let the men take away the ashes, and came back to the kitchen; she heard the bell ring, and, supposing it was the baker, went to the basement door, and, in passing to the street, fell into the hole left exposed by the uplifted grating, and was injured.

It was claimed by the defendant during the trial that the grating was opened by the direction of Mrs. Salter, and that such direction was conveyed to the men by the plaintiff. This was denied by the plaintiff. The defendant's counsel moved to dismiss the complaint upon the ground that the men who opened the grating were not, under the circumstances, employees of the defendant, and that the plaintiff was guilty of contributory negligence in not looking to see whether the grating was open before going out. The motion was denied, and the case submitted to the jury under instructions that the plaintiff could recover only in case she was free from negligence, and that the injuries were caused by the exclusive carelessness of the defendant or his employees, acting under his direction and control.

The jury rendered a verdict in favor of the plaintiff for \$500. The general term affirmed the judgment, and from the order of affirmance this appeal was taken.

E. Bartlett, for appellant.

A. Lamont, for respondent.

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VAN BRUNT, J.—There seems no ground whatever furnished by the evidence upon which to found the claim that the men doing these repairs were the employees of Mrs. Salter. They were not employed by her, they were not subject to discharge by her, they were not paid by her. As far as the particular work is concerned which was to be done, they may have been so far under her direction, but even such work was deemed by the defendant to be under his supervision, because he testifies that he was there every day to see that the men were doing their work faithfully. Mrs. Salter would have had no power to discharge these men, and the relation of master and servant did not in any respect exist between them. The question as to who should be employed in making the repairs, was determined by the defendant and not by Mrs. Salter; and it does not appear from the evidence in the case that she in any way interfered with or directed the manner in which these men were to do their work. Therefore, they being the employees of the defendant, if they were guilty of negligence, then the defendant is responsible for such negligence.

It is true that the defendant attempted to prove that there was some custom prevailing in this city between master mechanics and occupants of houses which are to be repaired, in regard to the direction of men while at work, and the manner of the payment of their wages, but the existence of even such a custom could not change the legal relations existing between the employer and the employed, even if such evidence was admissible. The question as to the contributory negligence of the plaintiff seems also to be disposed of entirely satisfactorily by the verdict of the jury. That question was left for the jury, and upon the facts of the case they found that the plaintiff was not guilty of negligence; and as a matter of law this court upon the facts cannot say that such finding of the jury was erroneous.

It is true that the plaintiff saw the grating open on

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Saturday. It is equally true that she saw it shut on Sunday and on Monday morning when she went to let the men in to go to work, and as it appears from the evidence, it was but a very few minutes after that, that the accident happened. Having noticed but a few minutes before going to the grating for the purpose of getting the bread from the baker, that the grating was down, it cannot be held as a matter of law that she was guilty of negligence when she went again, so shortly afterwards, in not stopping to look to see whether the grating was up or down. It might have well been that if she had not noticed the grating on that morning and had not looked to see whether it was up or down, that she might have been held guilty of contributory negligence in not looking to ascertain that fact, but having looked but a few minutes before, it cannot be held that it was her duty, after having seen that the grating was closed, and having no reason to suppose that it had been raised, that she was bound to look again to ascertain whether it had been so raised.

We are of the opinion, therefore, that no errors were committed upon the trial, and that the judgment should be affirmed, with costs.

Marine Court.

General Term—May, 1883.

GEORGE W. BETTS *against* HENRY E. COX.

Notice of dishonor of a promissory note was given to the indorser in an informal way, on a card deposited in his postal-box. The defendant received the card. The trial judge refused to let the plaintiff go to the jury on the question whether the card was sufficient to carry to the defendant knowledge of the protest of the note in suit. *Held*, error, and that the question should have been

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submitted. *Held*, also, that when a note falls due on Saturday, July 3, and the national holiday is celebrated on Monday, the 5th, a notice deposited on the 6th was timely.

Appeal from judgment entered on the dismissal of the complaint.

Platt & Bowers, for plaintiff and appellant.

A. J. Perry, for defendant and respondent.

MCADAM, J.—The note sued upon became due on Saturday, July 3, 1880, and was on that day protested. The Fourth of July, our national holiday, occurring on Sunday, it was celebrated on the July 5 (Monday). On Tuesday, July 6, 1880, the defendant, as indorser of the note sued upon, was informed of its dishonor. This information was conveyed on a card deposited in the postal-box of the defendant at his place of business.

On Wednesday, the 7th, the defendant was informed of the deposit of the card, and did not dispute its receipt. The plaintiff asked to go to the jury upon the question whether or not the notice was sufficient to convey to the defendant knowledge that the note was protested. We think the trial judge erred in refusing this request (See 77 N. Y. 363). If the party addressed receives the notice, or if it can be properly inferred by the jury from the facts of the case that it was received, the manner of its transmission is immaterial (*Daniels on Neg. Inst.* § 1003). The form of the notice is immaterial, so long as it enables the indorser to whom it is sent to secure the liability of others to him (*Id.* §§ 973, 974, 975). The rule is not intended to be technical, but to promote substantial justice between the parties (*Id.*).

We do not think that substantial justice has been done in this case. The note was sufficiently described, in view of the fact, that the parties held no other note to which

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the notice could have applied. The judgment appealed from must therefore be reversed, and a new trial ordered, with costs to abide the event.

SHEA, Ch. J., concurred.

Upon the new trial, the jury found for the plaintiff, and the judgment was affirmed by the general terms of the city court and court of common pleas.

New York Supreme Court.

Special Term—April, 1884.

MILES ET AL. *against* JAMES.

Injunction in summary proceedings. Equity will not restrain an action of ejectment or summary proceedings, where it is apparent that the plaintiffs have a good defense to such action or proceeding at law.

Where several courts have concurrent jurisdiction, the right to determine the controversy belongs to the tribunal to which resort is first had.

If the plaintiffs, who are proceeded against as tenants, have a defense which is available at law, they must make it in the proceeding without resorting to a court of equity.

LAWRENCE, J.—This is a motion to continue a temporary injunction restraining the defendant, his servants, attorneys and agents from prosecuting or carrying on proceedings before the Honorable DAVID McADAM, Chief Justice of the City Court of New York, for the recovery of possession of the premises numbers 1237 and 1239 Broadway. Section 2265 of the Code of Civil Procedure provides that in proceedings of this nature, "if the final order awards the delivery of the possession to the petitioner, the issuing or execution of the warrant

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thereupon cannot be stayed or suspended by any court or judge except in one of the following methods :

"First. By an order made, or an undertaking filed upon an appeal in a case, and in the manner specially prescribed for that purpose in this title.

"Second. By an injunction order granted in an action against the petitioner. Such an injunction shall not be granted before the final order in the special proceeding, except in a case where an injunction would be granted to stay the proceedings in action of ejectment brought by the petitioner, and upon the like terms, or after the final order, except in a case where an injunction would be granted to stay the execution of the final judgment in such an action and upon like terms."

An examination of the papers in this case, I think, shows that it is not one in which, if the action were for ejectment, an injunction would be issued.

In *High on Injunctions*, section 63, page 45, it is stated that "Equity will not retain an injunction restraining an action of ejectment where it is apparent that plaintiffs have a good defense to such action at law, and that the deed upon which plaintiff relies is void. And a preliminary injunction restraining proceedings in ejectment will be dissolved as to that portion of the property, the title to which can be properly determined in the legal forum. And it may be laid down as a general rule that equity will not restrain a person from the assertion of title to real estate unless the case be entirely free from doubt, and that where the title is being tested by an action of ejectment in a court of common law, having jurisdiction, the suit will not be enjoined, since the interference in such a case would be repugnant to the clearly established principle that, where different courts have concurrent jurisdiction, the right to determine the controversy belongs to that tribunal to which resort is first had."

In the case of *Knox v. McDonald* (25 *Hun*, 268) it was held that, to justify the granting of the injunction under

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section 2265 of the Code, it must be shown that the plaintiff is making an oppressive use of the judgment, or that he has ceased to own the premises, or that the defendant has, subsequently to its recovery, acquired some interest or equity in the property which should be protected, or that the judgment was obtained by fraud and collusion. And it was also held by the general term of this department (in *Cassel v. Fisk*, 2 *N. Y. Civil Pro.* 94-97) that a case should be very clear to justify the restraint by injunction of a summary proceeding instituted by the landlord to recover the possession of premises for non-payment of rent by the tenant. The cases of *Sherman v. Wright* (14 *N. Y.* 228), *Knox v. McDonald* (*supra*) and *Armstrong v. Cummings* (20 *Hun*, 313) are cited in the opinion of the court in *Cassel v. Fisk*. The learned court said in that case: "It is obviously the policy of the law to compel the surrender to the landlord of demised premises upon failure to pay the rent reserved, and nothing short of an extreme case, clearly established, will justify an injunction to stay such summary proceedings against the tenant."

It is claimed, however, in this case, that there are certain equities existing between the parties which cannot be passed upon by the learned chief justice of the city court in summary proceedings, and that, therefore, the plaintiffs bring this case within the rules stated in the cases above cited. I am quite satisfied, from my examination of the papers, that under the strict letter of the leases, rent is due from the defendant to the plaintiff. I am also quite satisfied that the claims which the plaintiffs allege that they have against the defendant, arising out of the contracts and leases referred to in the complaint, are such as can be adequately protected by an action at law, and in such cases I understand it to be well settled that an injunction will never be allowed (see *Broadwell v. Holcomb*, 65 *How. Pr.* 502).

The allegation in the complaint that the defendant is

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irresponsible is wholly denied in the defendant's answer, and the case made by the plaintiff's affidavits I regard as more than fully met by the answering affidavits of the defendant. So far as it is claimed that the plaintiffs have equitable rights, which are not cognizable in summary proceedings, arising out of the fact that they have made the deposits called for by the original agreements, it seems sufficient to say that such deposits were each of them, under the terms of the agreement, made as security for the rent which was to become due under said leases during the last year of the terms thereby created. It would not appear, therefore, that such deposits take this case out of the general rule, nor that in consequence thereof this court is authorized to stay proceedings instituted under the statute to dispossess the tenants (see *Paine v. Rector, etc. of Trinity Church*, 7 *Hun*, 89).

So far as it is claimed that the rent has actually been paid, it is sufficient to say that, if it has been paid, that fact can be made to appear before the justice before whom the proceedings are pending. And so far as it is alleged that there are unliquidated damages due to the plaintiff, it is sufficient to say that such damages, even if they exist, can be recovered in an action at law (see *Ward v. Kelsey*, 14 *Abb. Pr.* 106-108, and cases already referred to).

Again, if the plaintiffs have expended moneys in and about the building of the theater, at the defendant's request, such moneys can be recovered in an ordinary action at law.

For these reasons I am of the opinion the motion to continue the injunction should be denied, with costs.

Manneck Mfg. Co. v. Smith & Griggs Mfg. Co.

New York City Court.

*General Term—April, 1884.*THE MANNECK MANUFACTURING CO. *against*
THE SMITH & GRIGGS MANUFACTURING CO.

A cause heard and submitted to a judicial officer in his term remains *sub judice* till decided by him, though his term be ended, and he may sign findings therein after his term has expired.

This action was tried before Judge SHEA, and decided by him a few days before his term of office expired. His term as justice expired December 31, 1883, and he signed the findings of fact and conclusions of law January 4, 1884. Judge SHEA held that he had power to do so.

The defendant moved to vacate the findings and the judgment entered thereon, on the grounds before mentioned, which are assigned as irregularities avoiding the judgment.

The motion was denied, and the defendant appealed.

M. P. Stafford, for motion.

A. Walker Otis, opposed.

BY THE COURT.—MCADAM, Ch. J., and NEHRBAS, J.—We agree with Judge SHEA “that a cause heard and submitted to a judicial officer in his term remains *sub judice* till decided by him, though his term of office be ended; and that in practice the rendition of a judgment relates to the term at which it was finally submitted for determination.”

This view being correct, the order made below was right, and must be affirmed, with costs.

Affirmed on appeal by the New York common pleas.

The decision in *Harris v. Morange* (1 *City Ct. R.* 221), led to the

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adoption of section 25 of the present Code,—which provides that “An action or special proceeding, civil or criminal, is not discontinued by a vacancy or change in the judge of the court, or by the re-election or re-appointment of a judge; but it must be continued, heard and determined by the court, as constituted at the time of the hearing or determination. After a judge is out of office, he may settle a case on exceptions or make any return of proceedings had before him while he was in office, and may be compelled to do so, by the court in which the action or special proceeding is pending.”

Where a judge's term of office expires during a trial before him, and he is re-elected, he may conclude the trial (*Kelly v. Christal*, 16 *Hum*, 242).

New York Marine Court.

Trial Term—January, 1875.

WILLIAM VAN DERMINDEN *against* MINA ESSIG.

The parties made an agreement for the exchange of certain real property. They agreed to convey the property “free from all incumbrance,” except a mortgage which was to be assumed. The deed which the defendant held for his property contained a covenant against nuisances, and on the day for closing the contract, the plaintiff refused to take title, on the ground that the covenant aforesaid constituted an incumbrance. *Held*, that the covenant against nuisances was an incumbrance on the property, as it restricted its use, and that the plaintiff was entitled to recover \$100 damages, that being the sum which the party in default stipulated to pay to the other.

MCADAM, J.—The plaintiff and the defendant entered into a contract under their respective hands and seals, bearing date August 26, 1874, whereby the defendant agreed to convey to the plaintiff, the house and lot known as No. 182 Orchard Street, for \$27,900, to be paid by assuming three mortgages on the property aggregating \$18,900, and the remaining \$9,000 by a conveyance of four houses and lots belonging to the plaintiff, situated

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in Hudson City, New Jersey (to be transferred at \$18,000, subject to a \$9,000 mortgage thereon). It was, therefore, an exchange of property. Each of the parties was to deliver to the other a warrantee deed, according to the contract at a time and place mentioned therein, and each was to convey to the other the property, according to the terms of the exchange, "free from all incumbrance," except as aforesaid.

The time for closing the contract was adjourned, and on the adjourned day the plaintiff declined to consummate the exchange, on account of a covenant against nuisances contained in one of the deeds under which the defendant derived title. This covenant, the plaintiff claimed, restricted the use of the property, so that the plaintiff could use it only for purposes not forbidden. It was further claimed that the restraint upon the use of the property amounted to an incumbrance, because it was a restriction running with the land, and, as to the purposes inhibited, the plaintiff would acquire no usable right in the property. The plaintiff is correct. This covenant amounts to an incumbrance within the proper meaning of that term as defined by the authorities (*Roberts v. Levy*, 3 *Abb. Pr. N. S.* 311; *Gilbert v. Peleter*, 38 *N. Y.* 165; *Re Whitlock*, 10 *Abb. Pr.* 316; *Trustees v. Cornell*, 4 *Paige*, 510. And see 4 *Robt.* 647; 5 *Cow.* 143; 21 *Wend.* 120; 8 *Paige*, 351; 12 *How. Pr.* 551; 26 *N. Y.* 105; 23 *Barb.* 153). Being an incumbrance, the plaintiff was under no obligation to accept the defendant's title. (*Gilbert v. Peleter*, 38 *N. Y.* 165; *Morange v. Morris*, 3 *Keyes*, 48); and, being able to perform on his part (*Hart v. Hoffmann*, 44 *How. Pr.* 168), the plaintiff became entitled to the damages legitimately arising from the breach on the part of the defendant; and these having been "fixed and settled" by the parties in their contract at \$500, this sum is, of course, the measure and limit. The latter covenant cannot, in view of the facts and the moderate amount of damages, be regarded as a penalty,

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but as an agreement to pay so much as liquidated damages, fixed by the parties in advance of possible litigation. The jury properly found for the plaintiff, and the motion for a new trial must be denied.

This judgment was reversed by the general term of the marine court, but was reinstated, on further appeal to the common pleas, by an order reversing the marine court general term.

Covenant against Nuisance an Incumbrance.

See also, Anonymous, 2 *Abb. N. C.* 56 ; Plumb v. Tubbs, 41 *N. Y.* 442 ; Trustees a. Lynch, 70 *Id.* 440.

Liquidated Damages.

Where there is uncertainty as to the extent of the injury, and the stipulated sum seems reasonable and proper under all the circumstances of the case, and especially, where it is clearly expressed to be liquidated damages to be paid on a breach of the whole contract, or, on the breach of any certain provision of the contract, then it will be regarded as liquidated damages (*Field on Damages*, § 138. Upon this subject see also *Sedgwick on Damages*, marg. p. 399, *et seq.*; *Wood's Mayne on Damages*, marg. p. 122, *et seq.* And see *Wilson v. Duls*, 1 *City Ct. R.* 132).

New York Marine Court.

Trial Term—July, 1882.

STREBE, AS PRESIDENT, &C., against ALBERT.

Dissolution of benevolent society—Rights of members. An unincorporated society is not dissolved until its funds are divided among its members. An officer who receives moneys belonging to the society and by his negligence loses it, is responsible for the loss.

MCADAM, J.—At the meeting of February 18, 1881, the society resolved that its officers be directed to with-

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draw its moneys from the banks, and that the president be directed to distribute the same, and that the society be dissolved. In order to carry this resolution into practical effect the president must distribute to the different members the moneys drawn from the bank under its authority. This the president cannot do until he first receives the money from the defendant who obtained it from the banks under this resolution. The joint ownership of the fund continues until division thereof is actually made by the president, so that prior thereto no individual member can be said to have a separate proprietary interest in or to any specific part of it. The defendant's excuse for not paying over the money,—*i. e.*, that it was stolen from him,—having been held insufficient by the special finding of the jury, that the loss was the result of negligence, it follows that the plaintiff, as president of the society, is entitled to judgment for \$484.12, the amount of the fund in dispute, to the end that when collected he may distribute the same according to the resolution before referred to. When this result is accomplished, and not till then, will the society be dissolved in the full sense in which that term is used in the resolution.

Judgment accordingly. 7

New York City Court.

Special Term—January, 1884.

**THE BUTLER HARD RUBBER CO. *against* SOL-
OMON TOUBE COMPANY.**

Where the plaintiff misdescribed the defendant as "Solomon Toube Company," and the title turned out to be a name under which Solomon Toube did business,—*Held*, that as the summons had been served on Solomon Toube, an amendment might be allowed inserting his name as defendant.

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MCADAM, Ch. J.—The summons was served upon Solomon Toube, and he verified the answer as defendant. The summons and complaint misdescribed the defendant as the "Solomon Toube Company," the pleader supposing that this title applied to a corporation or a copartnership run by Toube. It turns out to be neither. The plaintiff now seeks to amend by striking out the supposed corporate name which represents no legal entity, and by substituting in its place the name of "Solomon Toube," the person served. The application will be granted, but on payment within five days of \$25 costs. An amended summons and complaint must be served at the same time. The defendant to answer within six days thereafter. The amendment to be without prejudice to the proceedings already had.

The case relied upon by the defendant (89 *N. Y.* 22), has no application to the question presented here. In that case, the application was to strike out the name of the defendant, a legally organized corporation, and to insert, instead thereof, the names of three individuals as defendants. The court properly held that this could not be done, as it involved a substitution of parties defendant. In the present case there was no corporation, and no substitution of parties is sought. The question which arises here is merely one of misnomer, which is always susceptible of amendment (see 17 *Abb. Pr.* 318, note; 20 *N. Y.* 355).

No appeal was taken.

Funk v. Tribune Association.

New York City Court.

Special Term—January, 1884.

WILKINSON against THE CHEMICAL FIRE INSURANCE CO. OF NEW JERSEY.

Opening default against corporation on application of stockholder. The court may permit a stockholder to intervene and defend on behalf of the corporation.

McADAM, Ch. J.—The defendant does not appear, and does not question the propriety of the service nor the sufficiency of the proof thereof. The court may permit a stockholder to intervene and defend on behalf of the corporation (10 *Abb. N. C.* 358). The stockholder having proved merits, the default will be opened on payment within three days of the costs and disbursements included in the judgment. The answer to be served at the same time. The judgment and all proceedings founded thereon to stand as security, and the action to be tried January 16. If the receiver desired to be made a party, he should have applied for such relief. The stockholder cannot bring the receiver into a litigation of this kind against his will.

A writ of prohibition applied for in the supreme court was denied. No appeal was taken.

New York City Court.

Special Term—January, 1884.

FUNK against THE TRIBUNE ASSOCIATION OF NEW YORK.

Examination before trial in action for libel. While a defendant will not be compelled in an action for libel or slander to furnish

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evidence in answer to a bill for discovery, the plaintiff may be required to submit to an examination (within proper limits) as to the truth of the libel.

MCADAM, Ch. J.—While it is true that the court will not compel a defendant in an action for libel or slander to furnish evidence in answer to a bill for discovery, to maintain the action and subject him to punitive damages in the nature of a penalty (5 *Barb.* 297; 9 *Paige*, 580; 2 *Abb. N. C.* 158; 14 *Hun*, 122), the rule does not prevent the defendant compelling a discovery from a plaintiff of the truth of the alleged libel, where such discovery will not subject him to a criminal prosecution, or to a penalty or forfeiture, or render him infamous (9 *Paige*, 580; 26 *Hun*, 166). The application to vacate the order for examination will therefore be denied, and the plaintiff will be required to submit to the required examination; but no question will be permitted, the answer to which may in any way tend to subject her to a criminal prosecution or penalty, or to render her infamous, nor will the witness be required to plead her privilege as an excuse for not answering such questions, such a requirement being contrary to the spirit and intent of the rule regulating such examinations (see 26 *Hun*, 169). So limited, the examination may be had on January 9, 1884, at 10 A. M., and the defendant to have three days within which to answer after the completion of such examination.

No appeal was taken.

Dillon v. Society for Prevention, &c.

New York City Court.

*Trial Term—February, 1884.***DILLON against THE AMERICAN SOCIETY FOR
THE PREVENTION OF CRUELTY TO ANI-
MALS. (No. 1.)**

Where an agent of the above society, appointed pursuant to an act of the Legislature, transcends his authority, he is personally liable therefor, and the society is not, unless it directed the act or approved of it afterwards.

McADAM, Ch. J.—The proofs show that Alonzo S. Evans, a special agent appointed by the defendant under chapter 11 of its by-laws, shot and killed a disabled horse belonging to the plaintiff, worth at the time about \$75. The plaintiff seeks to hold the defendant liable for the shooting. There is no evidence showing that the defendant directed the shooting or had any knowledge of it until after it was done. The defendant contends that under these circumstances, and in view of the act of 1874 (ch. 12), in reference to said society, that the agent, if he transcended his duty, is personally answerable, and that no liability attaches to the corporation from the mere fact that the act was done by an agent whom it had selected. The act in question (§ 4) provides that "any agent or officer of said society may lawfully destroy, or cause to be destroyed, any animal found abandoned and not properly cared for, appearing in the judgment of two reputable citizens called by him to view the same in his presence, to be glandered, injured, or diseased past recovery for any lawful purpose." It appears, therefore, that the agent, although appointed by the defendant, derived his authority to shoot disabled animals, not from any inherent power in or delegated authority conferred upon the corporation, but from power vested in the agent, as

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such, by legislative enactment,—the position occupied by the agent being likened to that of a police officer, who, although appointed by the Board of Police Commissioners, derives his authority from legislative sanction. The board would not be liable for the acts of the appointee, and an individual injured by the misconduct of the officer, so appointed, would have to seek redress from the appointee personally. There is a legal distinction between such appointees and those appointed by a private corporation (9 *Hun*, 401); but nevertheless I hold that the defendant cannot be charged for the misfeasance of its agent in respect to a duty not delegated to him by the corporation, but specially conferred upon him by statute for the public good, in the absence of evidence that the corporation directed the commission of the act complained of.

Upon this ground the complaint will be dismissed.

No appeal was taken.

New York City Court.

Trial Term—February, 1884.

DILLON *against* **THE AMERICAN SOCIETY FOR
THE PREVENTION OF CRUELTY TO ANI-
MALS.** (No. 2.)

Malicious prosecution—act of agent of corporation. While a corporation, like an individual, is liable for torts committed, including assaults, libels, false imprisonments and malicious prosecutions, the corporation is not liable for malicious prosecution in the absence of evidence of malice.

McADAM, Ch. J.—Assuming, as I do, that a corporation, like a private individual, is liable for torts committed, including assaults, libels, false imprisonments and ma-

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licious prosecutions (see cases collated in *Cooley on Torts*, 119-121), yet it is clear that where the person suing to recover for the malicious prosecution has been arrested (as in this case) upon a warrant first legally obtained, the corporation is not liable for malicious prosecution, in the absence of malice (*Hallock v. Denning*, 69 *N. Y.* 241; *Thaule v. Krekeler*, 81 *Id.* 428; *Davis v. American Society, &c.*, 75 *Id.* 362). In the present case malice is neither alleged nor proved.

Upon this ground, and without deciding whether, in law, the prosecution instituted by the agent in his own name, and apparently on his own behalf, binds the corporation in whose service he was engaged, the complaint will be dismissed, with costs.

No appeal was taken.

New York City Court.

Trial Term—March, 1884.

ALBERT TOWER ET AL. *against* THE HOWE
SCALE CO.

The plaintiffs agreed to furnish the defendant with "No. 2" foundry iron. Nothing was said as to the use intended to be made of it. The iron sold was of the brand called for by the contract. The defendant claimed that in order to make the iron suit its purpose it had to mix Scotch iron with it, and therefore undertook by way of counter-claim to charge the plaintiffs with the increased cost. *Held*, that such damages were not recoverable.

Rule as to special damages in exceptional cases. See note at foot of case.

Holbrook & Smith, for plaintiff.

J. L. Logan, for defendant.

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McADAM, Ch. J.—Lord ABINGER said: "A good deal of confusion has arisen in many of the causes from the unfortunate use made of the word 'waranty.' Two things have been confounded together. A warranty is an express or implied statement of something which a party undertakes shall be part of a contract, and, though part of the contract, *collateral to the express object of it*. But in many of the cases the circumstance of a party selling a particular thing by its proper description has been called a warranty, and the breach of such a contract a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfill; as if a man offer to buy peas of another and sends him beans, he does not perform his contract. But that is not a warranty. The contract is to sell him peas, and if he delivers anything in their stead, it is a non-performance of it (*Chanter v. Hopkins*, 4 M. & N. 399)."

Benjamin, in his book on Sales (Perkins' 1 Am. ed. 521), says: "There can be no doubt of the correctness of the distinction here pointed out. If the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability, and if this condition be not performed, the purchaser is entitled to reject the article, or, if he has paid for it, to recover the price as money had and received for his use." There are a number of authorities, however, holding that words of description may constitute a warranty that the articles sold are of the species and quality described. But it is unnecessary to go into an examination of these cases, for reasons which will appear hereafter. In *Gibson v. Bingham* (43 Vt. 410) it was held, that if the purchaser of an article *manufactured* for him under a special executory contract, there being no warranty or fraud, accept it, though defective, he becomes thereby bound to pay the contract price; but if he reject it, and give notice of the non-acceptance, he can

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bring his action for the non-performance of the contract, but he cannot accept it and bring such action both ; nor can he accept it and impose conditions and sue the vendor for non-compliance with the conditions imposed. In the present case the plaintiffs were manufacturers, and agreed to furnish the defendant with "No. 2 foundry iron." Neither the contract nor the evidence discloses the particular use the defendants intended to make of the iron, so as to imply a warranty that the iron was suitable for the purpose intended, or to lay the foundation for special damages as in case of the breach of such a warranty. Under the circumstances, the contract is substantially performed if the iron sold be of the brand called for by the contract, and there is no implied warranty that the iron is of any certain quality (*Dounce v. Dow*, 64 N. Y. 411). The iron called for by the contract was delivered to and accepted by the defendant. There is no evidence showing that the inferiority claimed could not be detected by examination or by a slight test. It was detected in the present case after using 1400 pounds of that which was claimed to be defective, and still the defendants used the remainder, mixing Scotch iron with it to make that furnished by the plaintiffs suit the defendant's purpose. The rule applicable under the laws of this State, as interpreted by the decisions, seems to be that if the vendee retains the property after a reasonable opportunity to ascertain the defect, he is liable for the contract price, in the absence of fraud or express warranty, unless he returns or offers to return the property. The retention of the property in such cases being considered as an admission by the vendee that the contract has been performed (*Reed v. Randell*, 29 N. Y. 358; *McCormack v. Sarson*, 45 *Id.* 265; *Beck v. Sheldon*, 48 *Id.* 365; *Dounce v. Dow*, 64 *Id.* 411). The vendee in this case ought to have exacted a specific warranty, which would have survived the acceptance of the goods (*Dounce v. Dow*, *supra*). But even assuming, for the present, that the description

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of the article in the contract implied a warranty in law, the measure of damages would be the difference between the agreed price and the market value (*Sedgwick on Dam.* 9 ed. 344; *Wood's Mayne on Dam.* 1 Am. ed. § 244). This difference in value was not proved upon the trial, nor was there any evidence which justified the exceptional rule of damages sought to be applied by the defendant,—i. e., the expense of the Scotch iron, which was mixed with the iron furnished by the plaintiffs to make it answer the requirements of the defendant.

Upon the entire case the direction to find for the plaintiff was right, and the motion for a new trial must be denied.

The judgment entered on the verdict herein was affirmed on appeal.

That Words of Description Imply a Warranty,

See *Dounce v. Dow*, 64 *N. Y.* 411; *Van Wyck v. Allen*, 69 *Id.* 61; • *White v. Miller*, 71 *Id.* 129; *Hawkins v. Pemberton*, 51 *Id.* 198.

That Words of Description do not Imply a Warranty,

See *Chandos v. Hopkins*, 4 *Mees. & W.* 399; *Gardiner v. Lane*, 12 *Allen*, 44; *Benjamin on Sales*, 4 Am. ed. § 600; *Seixas v. Wood*, 2 *Caines*, 48; *Carley v. Wilkens*, 6 *Barb.* 557; *Sweet v. Colgate*, 20 *Johns.* 196; *Hotchkiss v. Gage*, 26 *Barb.* 141.

If, under a contract of sale, a delivery was made through mistake of an article different from that agreed upon by the parties, there will be no sale of the article delivered, and no property in it will pass, for the simple reason, that the vendor has not agreed to sell, nor the vendee to buy it (12 *Allen*, 44).

Special Damages in Suit by Vendee Against Vendor for Non-Performance.

Ordinarily, the difference between the contract price and the market price, at the time and place of delivery of the article contracted to be furnished, is the measure of damages; but, where the vendor, knowing that the purchaser has an existing contract for a re-sale at an advanced price, and that the purchase is made to fulfill such contract, agrees to supply the article to enable him to do so, a different rule prevails, and upon breach, the purchaser may.

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recover the profits upon the re-sale, of which he has been deprived by the default of the vendor (Messmore v. New York Shot & Lead Co., 40 N. Y. 422. See also 60 N. Y. 487).

Gains prevented, as well as losses sustained, may be recovered as damages for breach of a contract, where they can be rendered reasonably certain by evidence, and have naturally resulted from the breach (White v. Miller, 71 N. Y. 133). •

Sale of Seed.

Damages for breach of warranty. See *Passinger v. Thorburn*, 34 N. Y. 634.

Injurious Quality of Thing Sold.

One buying coal-dust to be used in making brick, stated that if mixed with soft coal-dust, it would destroy the brick, and the seller warranted that it was free from soft dust. *Held*, that the measure of damages for the breach of warranty was not the difference in value between the article contracted for and the article received, but was the injury resulting to the brick from the presence of such soft coal-dust (Milburn v. Belloni, 30 N. Y. 53).

The sellers of wool knew that it was bought by plaintiffs to manufacture into hats, and if there were any cotton in it, it would be unfit for that purpose, but they did not warrant that it was fit for that purpose, but only that the flocks contained no cotton. *Held*, that the only damages which plaintiffs could recover for the breach of this warranty, were the difference between the market value of the wool in its actual state, and what it would have been worth had it contained no cotton, with interest on that difference. They could not recover their losses caused by manufacturing hats which proved to be of less value on account of the intermixture of the cotton (Prentice v. Dike, 6 Duer, 220. And see *Wood's Mayne on Damages*, 1 Am. ed. 34-41).

MacTeague v. James.

New York City Court.

General Term—April, 1884.

CHARLOTTE MACTEAGUE, PLAINTIFF AND RESPOND-
ENT, *against* EDWARD D. JAMES, DEFENDANT
AND APPELLANT.

Pleading. Action on note. The plaintiff sued the defendant as the indorser of a promissory note made by one D. S. James, to the plaintiff's order. *Held*, that an answer alleging that the note was indorsed for the plaintiff's accommodation set up a good defense; and that, owing to the peculiar phraseology of the note, the plaintiff ought to have alleged facts which made the defendant liable as first indorser.

Appeal from an order overruling defendant's answer as frivolous.

The action was against the defendant as the indorser of a promissory note made by one D. S. James to the order of plaintiff. The complaint, after setting forth the making of said note by D. S. James, alleges: "That thereafter, and before the maturity of said note, and before its delivery to the plaintiff, the said defendant, Edward D. James, indorsed the said note, and the same so indorsed was delivered to plaintiff by said D. S. James, for value, before maturity thereof." The complaint then alleges presentment of the note at maturity, demand of payment, refusal, protest and due notice of protest to the indorser, and non-payment of the note.

The answer, first, "denies each and every allegation in the said complaint contained, not hereinafter admitted or qualified;" and, second, alleges that defendant indorsed the note for the accommodation of the plaintiff.

Isaac L. Eybert, for appellant.

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Louis S. Phillips, for respondent.

MCADAM, Ch. J.—While the first paragraph of the answer may, under the decisions, be bad as a denial of the allegations of the complaint, the second paragraph of the answer is not open to that objection. That paragraph pleads as an affirmative defense that the note in suit was indorsed by the defendant without consideration, and as an accommodation to the plaintiff, and that such indorsement was made subsequent to that of the plaintiff. The plaintiff is payee of the note, and presumably the first indorser thereon. The new matter pleaded in the answer discloses a complete defense to the note, for, in order to recover thereon, the plaintiff, owing to the peculiar wording of the note, ought to have alleged and was bound to prove, the facts which made the defendant liable as first indorser (See *Moore v. Cross*, 19 *N. Y.* 227, and *Bacon v. Burnham*, 37 *Id.* 614, and kindred cases).

The answer was not frivolous, and the order awarding judgment thereon must be reversed, with \$10 costs and disbursements.

NEHRBAS and HYATT, JJ., concur.

When a promissory note is made by A., payable to the order of B., and C. indorses it, the legal presumption is that B., the payee, is to be the first indorser, and that C. is to have his remedy over against B., in case C. is obliged to pay the note. Hence, B. cannot sue C. upon the note, unless he overcomes the presumption by alleging, and, if denied, proving, that the note was taken by B. upon the understanding that C. should indorse it, and that C. did indorse it with the intention of becoming liable thereon to B. Thus in *Moore v. Cross* (19 *N. Y.* 227) the entire transaction was pleaded, and a recovery on such a note was sustained.

Roome v. Collins.

New York City Court.

Trial Term—June, 1884.

ROOME ET AL. *against* COLLINS.

Where plaintiffs sue as upon contract and enter judgment in that form it is a bar to an action of deceit in inducing the credit which gave rise to the cause of action.

MCADAM, Ch. J.—The plaintiffs herein recovered judgment on the 14th of September, 1883, against the defendant as upon contract for the sale and delivery of certain goods. The judgment proved unproductive, and the plaintiffs brought the present action in form for deceit in inducing the credit given upon the sale. The causes of action are identical, but the form of action different. I decide that the first judgment bars the present action, notwithstanding the change in the form of remedy (*Caylus v. N. Y. & K. R.R. Co.*, 76 *N. Y.* 609; *Morgan v. Skidmore*, 3 *Abb. N. C.* 102; *Baxter v. Drake*, 85 *N. Y.* 504). The cause of action was merged by operation of law, and it can never again become the basis of an action between the same parties (*Freeman on Judgments*, § 215; *Goodrich v. Dunbar*, 17 *Barb.* 644; *Clark v. Rawling*, 3 *N. Y.* 216; *Shuman v. Strauss*, 52 *N. Y.* 407; *Wyman v. Mitchell*, 1 *Cow.* 316; *Dresser v. Brooks*, 3 *Barb.* 429; *Mallory v. Leach*, 14 *Abb. Pr.* 449, note; *Cormier v. Hawkins*, 69 *N. Y.* 188).

The plaintiffs claim that they discovered the fraud after the first judgment was recovered, from which they argue that they cannot be said to have waived their right of election. They knew the defendant had made representations and that he did not keep his promises. These circumstances were sufficient to put the plaintiffs upon inquiry as to the truthfulness of the defendant's represen-

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tations before instituting legal proceedings. They omitted to make inquiry, and sued on the contract for the debt. They elected to pursue the remedy invoked, and are concluded by it (*Rosenheim v. Godwin, City Ct., MS. opinion filed December 31, 1883*).

For these reasons there must be judgment for the defendant.

No appeal was taken.

New York City Court.

Trial Term—June, 1884.

LELOUP *against* ESCHAUSSE.

Seduction of daughter. Action by parent. The action of seduction is based on mere loss of service, but this is eminently a legal fiction. Proof of the slightest loss of service, or the most trifling injury, if the direct result of the act, is sufficient to uphold the action.

MCADAM, Ch. J.—The ruling in *Knight v. Wilcox* (14 N. Y. 413), that in cases of seduction not followed by pregnancy no action will lie, has not been well received nor has it been literally followed in this State. In *White v. Nellis* (31 N. Y. 405) a recovery was had in a case where the defendant seduced the plaintiff's servant and communicated to her a venereal disease. That pregnancy is not essential to maintain the action is demonstrated by the fact that if a debased woman lures to her vile embrace an innocent boy, and infects him with a loathsome disease, she is equally liable to this action if an injury to his master's right to service follows the crime (31 N. Y. 409).

Nor do I think that either pregnancy or disease is essential to its maintenance where the parent brings the

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action. The law will, in such case, imply at least nominal damages from the wrongful act, and these, although slight, will sustain the action. In *White v. Nellis* (31 *Barb.* 279, affirmed in 31 *N. Y. supra*) and *Ingersoll v. Mullen* (31 *Barb.* 47), in both of which cases *Knight v. Wilcox* was cited, it was held that the action would lie though pregnancy did not follow the seduction. The action is founded on the relation of master and servant rather than on that of parent and child, and there should be some loss, however slight.

In *Lipe v. Eisenherd* (32 *N. Y.* 236) DENIO, Ch. J., said: "The object of the action, in theory, is to recover compensation for the loss of the services of the person seduced. This is so far adhered to that there must be a loss of that kind or the action will fail; but when that point is established, the rule of damages is a departure from the system upon which the action is allowed. The loss of service is often merely nominal, though the damages which are recovered are very large."

The action is based on mere loss of service, though this "is eminently a legal fiction," says *Sedgwick on Damages* (vol. 2, 7 ed. p. 512), "for the damages are generally large, and are left much to the discretion of the jury."

In *Lampmann v. Hammond* (3 *T. & C.* 294) the court said: "The father may maintain the action for the seduction of his minor daughter, upon the presumption, without proof, of a loss of service, because he is entitled to command such service."

In *Ingersoll v. Muller* (*supra*, p. 50) the court held that "Proof of the slightest loss of service or the most trifling injury, if the direct result of the unlawful act, is sufficient to uphold the action."

Lord ELDON (in *Bedford v. McKowl*, 3 *Esp.* 119) said, "In point of form the action only purports to give a recompense for the loss of service, but we cannot shut our eyes to the fact that this is an action brought by the parent for an injury to her child. In such a case, I am of

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opinion that the jury may take into consideration all that she can feel from the nature of the loss. They may look on her as losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation; and as the parent of other children whose morals may be corrupted by her example."

It has been laid down that actions of this sort are brought for example's sake, and although the plaintiff's loss may be pecuniarily small, yet the jury do right in giving liberal damages (*Wood's Mayne on Damages*, 659). The courts have wisely drifted away from the broad rule declared in *Knight v. Wilcox* (*supra*), the practical effect—although not the purpose—of which was to protect libertinism when not followed by pregnancy.

The verdict for the plaintiff was right, and the motion for a new trial must be denied.

City Court.

Trial Term—June, 1884.

McNICHOLL *against* KANE.

The husband is liable for the tortious acts of the wife committed in his absence, since the Code, in the same manner, and to the same extent that he was before the Code.

MCADAM, Ch. J.—This action is to recover damages for slander uttered by the defendant, a married woman, who, by way of defense, pleads the non-joinder of her husband as a party defendant. The plea is admitted to be true, and the question is, whether the husband is a necessary party. It is conceded that if the common law rule is to be applied, that the husband ought to have been joined as a defendant; but it is contended that since

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the Code of Procedure, permitting a married woman to defend as if she was single (*Code*, § 450), the reason for the common law has ceased, and with it the rule itself (*Fitzgerald v. Quann*, 1 *Civ. Pro.* 273; *Muser v. Miller*, 3 *Id.* 388).

While it is true that one of the reasons assigned for the rule by elementary writers is, that the wife at common law could not be sued alone, and that if the husband were also protected from responsibility, the injured party would be entirely without redress (*Macquen on Husband & Wife*, pt. 1, p. 127), yet this was not the sole ground of the husband's liability. The marital relation formed the real ground—the inability of being sued alone, a mere incident. The legal existence of the wife was suspended during the marriage, or at least consolidated into that of the husband, under whose wing, protection and cover she was theoretically supposed to perform everything (1 *Blacks. Comm.* 442).

This rule still continues, excepting as to rights of property and the like in respect to which the husband and wife are, by force of express statute, considered as two distinct persons. But the statute goes no further, and it is only in respect to these statutory rights and the liabilities growing out of them that the wife is, by a fiction of law, regarded as a single woman for the purpose of suing and being sued alone. Section 450 of the Code is to be construed with especial reference to those statutes. That section does not purport to change liabilities, but simply allows married women, when solely interested or liable by force of existing laws, to sue or be sued as if they were unmarried. So far only as the husband has been relieved from control has he been relieved from responsibility. To go further, extends the section in question beyond its evident purpose and meaning. If the Legislature had intended by section 450 to relieve the husband from his common law liability for the tortious acts of his wife committed in respect to persons and things in which

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by the enabling statutes she has acquired no right of property, language indicative of such intent would have been employed. It is, therefore, safer to stand by the old principles and precedents of the common law until they have been changed by intelligent legislative enactment, than to attempt by judicial decisions to do that which the courts think the Legislature ought to have done.

Until more authoritatively enlightened, this court will adhere to the old established rule that for torts committed by the wife in the absence of the husband the latter is a necessary party, and must be joined as a defendant (1 *Civ. Pro.* 278, 279; and see opinion of EARLE, J., in *Bertles v. Nunan*, 12 *Abb. N. C.* 279).

For these reasons there must be judgment for the defendant on her plea of non-joinder.

City Court.

Trial Term—June, 1884.

MOSES *against* BATES ET AL.

The master is not liable for a criminal prosecution set on foot by his credit clerk without proof that the master either authorized it in the first instance or approved of it afterward.

MCADAM, Ch. J.—The action is for malicious prosecution. The plaintiff was arrested on a warrant issued by a police justice on the complaint of Mr. Dickinson, the credit clerk of the defendants.

In order to recover, the plaintiff was bound to prove not only that the prosecution was set on foot by the defendants, but that it was instituted by them maliciously and without probable cause. No malice on the part of the defendants was proved, and none can be inferred, as

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for aught that appears to the contrary the defendants had no knowledge whatever of the prosecution. Dickinson, the credit clerk, had no express authority to commence the prosecution, and none can be implied from the nature of his employment, which does not by intendment embrace the power to arrest his master's customers (*Mali v. Lord*, 39 *N. Y.* 381). If there was malice, it was Dickinson's, and in law the act was his, and not his employers, for the master is not generally liable for the willful acts of his servant (*Wright v. Wilcox*, 19 *Wenl.* 343).

The railroad cases relied upon by the plaintiff were based upon the principle that a part of the duties of the servant was to exclude from the cars such passengers as refused to pay fare, or to comply with the regulations adopted by the company; and that, having authority from the master to perform such acts, the latter is responsible for the manner in which they are performed by the servant. This is as it should be; for where the power is conferred, the master is liable for any lack of discretion by the agent in the manner of its exercise.

But where there is no power in the servant, the act is his and not the master's. To hold the latter, the act must be within the scope of the servant's authority. If within such scope the servant makes a careless mistake of commission or omission, the law holds it to be the master's business negligently done, and for this the latter is liable, because he is bound at his peril to employ servants who are skillful and careful. The distinction is marked and well settled by authority.

The complaint was properly dismissed, and a motion for a new trial must be denied.

Goldberg v. Rouse.

City Court.

*Trial Term—June, 1884.*GOLDBERG *against* ROUSE ET AL.

The defendant owned a second mortgage on certain real property. The plaintiff's assignors purchased the property, subject to the mortgage, but did not assume its payment. The defendant signed an agreement to take off ten per cent. from the face of their mortgage. The plaintiff's assignors thereafter conveyed the property, and the vendee paid the balance due on the mortgage without exacting the deduction of ten per cent. *Held*, that the action could not be maintained.

MCADAM, Ch. J.—The defendant owned a second mortgage on property in Allen street, this city. The plaintiff's assignors purchased the property subject to the mortgage, but did not assume its payment. The defendant signed an agreement in these words: "I hereby agree to take off ten per cent. of the whole sum." The plaintiff's assignors paid certain installments on the mortgage of \$450 each, which were credited as \$500 each (the ten per cent. being allowed thereon). The plaintiff's assignors thereupon conveyed the property, and their vendee paid the balance of the mortgage debt without exacting the abatement of the ten per cent. thereon. The plaintiff's assignors, by this action, seek to recover the ten per cent. abatement on the sum paid by their vendees.

Without considering the question whether the agreement was void for want of mutuality, I decide that the plaintiff has no cause of action. That in the absence of a covenant to pay the ten per cent. to the plaintiff's assignors, the contract (if legal) inured to the benefit of the persons who owned the fee of the mortgaged property at the time the payment on which the abatement claimed was made. That the conveyance of the property by said as-

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signors prior to such payment enabled the vendees (who made the payment) to assert whatever rights to the abatement of ten per cent. which the contract conferred. That the vendees, by paying the balance of the mortgage debt without exacting the abatement, waived all claim to it. The payment was not made under protest or duress, and must be regarded as having been voluntarily made (*Windbiel v. Carroll*, 16 *Hun*, 101). The agreement of the vendees to pay the ten per cent. to the plaintiff's assignors in case it was allowed to the vendees, does not aid the plaintiff's case. The vendees did not receive the abatement, and by their voluntary payment all right to it was lost. No personal covenant on the part of the defendant to pay the ten per cent. over to the plaintiff's assignors can be implied, the contract being in writing under seal, containing no such promise.

Under the circumstances, the disputed question of fact whether the mortgage debt was to be paid at a stated time becomes immaterial, although I believe the question of time entered into the contract. The defendant received no additional security for his debt, and was not likely to make a voluntary deduction without some equivalent, which in my judgment was the speedy payment of the mortgage, which the defendant testifies the plaintiff's assignors agreed to, but did not make.

The defendant is therefore entitled to judgment.

City Court.

Trial Term—June, 1884.

TORREY ET AL. against ROBERTS.

Measure of damages on sale. Defendant bought a steam engine of the plaintiff for \$400, and agreed to sell it to a customer for

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\$682.50, and sought to counter-claim the difference, to wit, \$282.05. *Held*, that in the absence of proof that the engine had no market value, or that the plaintiffs knew of the sub-contract at the time of sale, that the special and exceptional rule of damages claimed was inapplicable.

MCADAM, Ch. J.—Upon the trial the plaintiff's cause of action was conceded. The contention narrowed down to the second counter-claim, the first having been waived. The second counter-claim alleges a sale to the defendant of a certain engine complete at the agreed price of \$400; that the plaintiffs refused to deliver said engine according to said agreement; that after the purchase of said engine the defendant agreed to sell it to a customer for \$682.50, whereby the defendant suffered damage, it is said, to the extent of \$282.50, the difference between the sum the defendant agreed to pay the plaintiffs for the engine and the price the defendant was to get for it from his customer. This difference forms an exceptional rule of damages, special in its nature, recoverable only in cases in which vendors sell an article to enable the vendee to fulfill a subsisting contract of resale to another at an increased price. When the vendors have knowledge of such a sub-contract, the loss of profits thereon may justly be said to enter into the contemplation of the parties making the principal contract (*Messmore v. New York Shot & Lead Co.*, 40 N. Y. 422; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 *Id.* 487).

There is no allegation in the answer that the engine had no market value to bring it within the principle laid down in the case last cited, or that the vendors knew of the sub-contract, to bring it within the rule declared in the first case cited, or that the sub-contract was subsisting at the time of the sale by the plaintiffs; nor was there any allegation that the market value of the engine exceeded the price which the defendant agreed to pay the plaintiffs therefor. The rule is, that such damages as are not implied by law from a breach of the contract sued

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upon must be set out in the pleading (*Moak's Van Sant v. Pl.*, 3 ed. 244). The facts showing the special damages sought to be proved, should therefore have been specially pleaded (*Parsons v. Sutton*, 66 N. Y. 92).

Under the circumstances, no legal damages resulting from the alleged breach were alleged, and hence the direction to find for the plaintiffs was right. It follows that the motion for a new trial must be denied.

City Court.

Trial Term—June, 1884.

JASON H. SHERWOOD, EXECUTOR, &C., *against*
ROBERT B. GARDNER ET AL.

Renewal of lease. Special partnership. Steam power. Damages.

Where a lease is made for two years with the privilege of renewal, and the tenant in due time serves the requisite notice of an election to take the renewal, the original lease is thereby continued in force for the new term. No formal renewal instrument is necessary. When the lease is renewed the tenant is liable for the rent, whether he occupies the premises or not; but with regard to steam power which the defendant was to receive, the rule is different. The actual loss to the landlord in consequence of the tenant's failure to receive the steam power is in such a case the basis of compensation, and this must be proved.

I. T. Williams, for plaintiff.

Goodrich, Deady & Platt, for defendants.

McADAM, Ch. J.—By the terms of the agreement set out in the complaint, the plaintiff's testator leased to "Garden & Co.," a firm composed of the defendants, a room on the first floor of 292 and 294 Monroe street, and two lofts, 290, 292 and 294 Monroe street, with certain horse-power,

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for two years from May 1, 1881, at \$3,800 per year, payable monthly. The lease also contained provisions as to the rate of compensation for the horse-power. | The agreement likewise contained the following provisions, viz: "Garden & Co. are to have four yearly renewals of this agreement." | (2) "At the end of two years, all renewals are to be made at the rate of \$60 per horse-power yearly and \$1,600 for the rooms."

| The first question presented is whether this agreement is to be treated as a continuous lease for six years or as a demise for two years with the privilege to the tenants (at their option) of four yearly renewals at the new rental specified. The phrase, "Garden & Co. are to have four yearly renewals of this agreement," in order to make effective the evident intent of the parties, must be construed to mean that Garden & Co. are to have the privilege of the four renewals if they elect to take them (*Bruce v. Fulton Nat. Bank*, 79 N. Y. 154). So construed, the lease expired May 1, 1883, unless the right to renew was exercised by the defendants in such manner as to continue the lease. | The plaintiff claims that the defendants did exercise this privilege, and that, by force of the notice which will be referred to hereafter, the lease was continued for another year—to wit, from May 1, 1883, till May 1, 1884. The action is brought on this theory to recover the rent for May and June, 1883, amounting to \$266.66, and the further sum of \$400 for the use of forty horse-power of steam at the rate of \$60 for each horse-power, making the total sum claimed \$666.66. | The notice claiming the renewal is in these words: |

"New York, March 7th, 1883.

"Executors of the Nelson Sherwood estate.

Dear Sir:

| "Pursuant to the option contained in the contract between us, dated March 11th, 1881, we hereby elect to continue that contract for the term of one year from

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May 1st, 1883. We will be pleased to have an amicable settlement of the outstanding account.

Yours very truly,
"GARDNER & DUDLEY,
"Lately Garden & Co."

Gardner and Dudley, whose names are appended to this notice, were, with the defendant Garden, the members of the old firm of Garden & Co., which was dissolved on or about the 31st of October, 1881, by the retirement of Mr. Garden, as a general partner. Upon the following day the old firm was re-organized on a new basis. Gardner and Dudley became the general partners, and Garden the special, having contributed as such to the capital, \$100,000 in cash. In the re-organized firm, the defendants adopted "Gardner & Dudley" as the firm title. The re-organized firm succeeded to the business and property of the old firm, and continued the occupation of the demised premises under the original lease, until it expired on May 1, 1883. The notice of election to take a renewal of the lease for another year was served upon the plaintiff on the day it bears date (March 1, 1883), and the legal effect of such election was to make the lease continuous for three years from May 1, 1883, as much so as if the words "three years" instead of two had been inserted in the original demise (*Kramer v. Cook*, 73 *Mass.* 550; *Delashman v. Berry*, 20 *Mich.* 292; *Orton v. Noonan*, 27 *Wisc.* 272; *Id.* 300; *Paulet v. Cook*, 44 *N. H.* 512; *Chretien v. Doney*, 1 *N. Y.* 419; *House v. Burr*, 24 *Barb.* 525).

The notice of election to renew is signed "Gardner & Dudley," but the title represents the three defendants. They could not well have signed the name of "Garden & Co.," because that designation had been previously transformed into that of Gardner & Dudley. The change of firm or designation did not relieve Garden from his obligation. He was personally liable on the lease in the

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first instance, and he still continued his interest in the lease. The general partners of the firm, by his implied assent having elected to continue the lease pursuant to its provisions, asserted in a legal way their firm's right to the renewal. The lease with the privilege of renewal was an asset placed in the hands of the new firm by the act of Garden. He gave them (impliedly at least) the power of continuing it, knowing that he was jointly liable thereon while it continued in force according to its provisions. He expressed no dissent to the act of his partners. The absence of his name from the notice to renew was not (under the circumstances) calculated to create suspicion. No objection to it was raised by the plaintiff, and the notice was regarded by all the parties as in proper form (see *Reed v. St. John*, 2 *Daly*, 218). No further writings were necessary, and the fact that several meetings were had with reference to drafting a new lease or settling previous disputes as to the amount of steam power chargeable during the first term does not alter the cardinal fact that the defendants had already by their notice continued the old lease at the new rent for another year (see *Luke v. Hake*, 5 *Daly*, 15). Nothing was said or done at these meetings to release the defendants, and the letter of Mr. Williams of March 27, 1883, indicates in an expressive manner that the defendants were not to consider themselves released from their election to continue the lease for another year. The defendants claim that subsequently to sending the election to renew for another year they notified the plaintiff that they recalled the notice. But the election had already ripened into a new contract which could not be recalled or rescinded except by the mutual agreement of the parties. Such a release or rescission is neither pleaded nor proved. Surrender, in fact or by act or operation of law, is not pleaded. Vacating the premises on May 1, 1883 (if the lease was legally renewed for another year) does not amount to such a surrender and acceptance as will relieve the defendants

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from the extended contract (Thomas v. Nelson, 69 N. Y. 118).

Upon the facts stated, the defendants are liable for the rent for May and June, 1834, amounting to \$266.66. The rent for the first two years was payable monthly, and this provision regulates the mode of payment during the continuance of the lease, whether by renewals or otherwise.

As to the steam-power a different question arises. The defendants did no business on the premises after May 1, 1883; so that they did not receive the use of the steam-power for which they agreed to make compensation. Under such circumstances, the contract being executory, the measure of damages is not necessarily the whole amount agreed to be paid, but a just recompense for such injury as the party has sustained on account of the breach of the agreement (Clark v. Marsiglia, 1 Den. 317). In such a case, the actual loss is the basis of compensation. The provisions of the lease in respect to compensation are divisible. So much is to be paid for rent and a specific amount for horse-power.

As to the rent, the plaintiff gave the defendants the right to occupy his premises; he was to do no more. Whether or not the defendants enjoyed the privilege to the best advantage is of no consequence to him. He gave all he agreed to give them. But the furnishing of steam-power daily involves continuous acts of labor on the part of the plaintiff, and when relieved of this duty the law is satisfied if the actual loss or injury is made good. No legal measure of damage as to the steam-power has been furnished. The actual damages may be equal to the contract price, but not necessarily or presumably so, and hence they must be established by proofs. The only damages which can be allowed on this branch of the case, on the present proofs, will be nominal damages of six cents.

For these two amounts, aggregating \$236.72, with

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\$15.96 interest, making in all \$182.68, the plaintiff is entitled to judgment.

Affirmed by city court and by common pleas general term.

City Court.

Trial Term—June, 1884.

JOHN HENRY HULL *against* ENOCH MORGAN
SONS CO.

Liability of corporation and trustees for counsel fees. Where the trustees of a corporation have a contest as to the regularity of their election, or as to the propriety of their conduct, and employ an attorney to represent them, they become personally liable to the attorney for his fees, but the latter has no claim therefor against the corporation. Ordinarily, the officers of a corporation, in employing an attorney, make the corporation liable only in the cases in which it is a party, or is pecuniarily interested. Nothing short of an official act of the corporation, evidenced by an entry on its minutes or the like, will make it liable for fees in contests or litigations in which it is not a party, or in which it is not pecuniarily interested.

J. H. Hull and J. A. Mapes, for plaintiff.

Blatchford, Seward, Griswold & Da Costa, for defendant.

MCADAM, Ch. J.—The jury, upon the trial, by special verdict, found that the services specified in the bill of particulars prior to July, 1882, had been fully paid. It was, by consent of the parties, reserved for the court to decide whether the defendant (a corporation) can legally be charged for the services specified in the bill of particulars to have been rendered subsequent to July, 1882, and if so, to determine the reasonable value of such services.

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The items of the bill so reserved may be grouped under two heads, viz.:

First. Services rendered in the matter of the petition to set aside the election of trustees, held on April 17, 1882, on the ground of fraud, collusion and conspiracy.

Second. Services rendered in 1883, in what may be called the injunction suit, to restrain the majority directors from passing what were termed illegal amendments to the by-laws.

The rendition of the services is not disputed, but it is contended by the defendant that the services were not rendered upon its retainer, and were not for its benefit.

The defendant does not question the correctness of the rule laid down in the case of *American Ins. Co. v. Oakley* (9 Paige, 496), where Chancellor WALWORTH said: "It is a matter of every-day occurrence for the president or other head officers of a corporation to employ and retain attorneys and counsel to prosecute or defend suits, or to assist in legal proceedings in which the corporation is interested" (see also *Hooker v. Eagle Bank of Rochester*, 30 N. Y. 83, 86). These decisions are founded on the principle that an act within the scope of an officer's authority, or within the scope of its legitimate business, will bind the corporation.

But it is claimed that the scope of an officer's authority as an agent of the corporation does not extend to matters in which the company has no interest. The first bill is for services claimed to have been performed in the supreme court, in the matter of the election of trustees of Enoch Morgan Sons Company. The proceeding was instituted upon the petition of George F. Morgan and John H. Evans, claiming to be holders of a majority of the stock of said corporation, to set aside the election of trustees, had in the spring of 1882, upon the ground of conspiracy and fraud on the part of the trustees who were elected. The application was directed against the five trustees who claimed to have been elected, and

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"Enoch Morgan Sons Company," the defendant herein, was made a nominal party defendant. The contest was really one in which the two petitioners on the one side and the five trustees upon the other were alone interested.

"In this question the corporation had no interest. No possible determination of it could affect either the existence or the rights, or the property of the society. No corporate duty was neglected by omitting to defend against it. If it should be determined that the trustees held the office by legal election, of course there would have been no effect either upon corporation or individuals. If it should be determined that their claim to the office was invalid, there would simply result to the corporation the opportunity and duty to proceed to a legal election. While it is better that corporate offices should be exercised by officers *de jure* than by officers *de facto*, it is not for the reason that corporate life is necessarily put in jeopardy by the latter. Therefore, it was not the right of the committee to expend corporate money in defending for themselves the personal privilege of holding office; they were not necessary to the corporate existence. Indeed, the real peril to the society would seem to rest in the claim that its members, as individuals, can, without its consent—without its knowledge, even—expend a part or all of its property in personal contests for the possession of its offices" (Harrison v. First Presbyterian Society, 46 Conn. 529. See also Smith v. Duke of Manchester, L. R. 24 Ch. Di. 611; Green's Brice's Ultra Vires, 2 ed. 284, 285; Kernaghan v. Williams, L. R. 6 Eq. Cas. 228; Smith v. Nashville, 4 Lea, 69, 72; People v. Lawrence, 6 Hill, 244; Healey, v. Dudley, 6 Lans. 115, 127; Halstead v. Mayor, 3 N. Y. 431; 1 Dillon Munic. Corp. 2 ed. § 147; In re Bell, 2 Upper Canada C. P. 507; Wadsworth v. Herkimer, 35 N. Y. 189; Merrill v. Plainfield, 45 N. H. 126; Gregory v. Bridgeport, 41 Conn. 96; Vincent v. Nantucket, 12 Cush. 103; Butler v. Milwaukie, 15 Wisc. 493).

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Many of the authorities cited are municipal corporation cases, in which, in the different ways the question arose, the courts adhered to the rule that neither of the rival claimants to an office can legally charge the corporation with the expense of the contest, and that any appropriation of money by the corporation for such a purpose is illegal. I have not overlooked the fact that the plaintiff was one of the counsel of the corporation defendant.

The minutes of the corporation contain the following:

“ Meeting April 26, 1877.

- “The president stated that there were numerous counterfeits and infringements of our sapolio—he thought it best we should take all necessary steps to protect our rights. It was then moved and seconded that the president and treasurer be constituted a committee on law, with power to employ counsel, pay the same, and do all things necessary in the matter of sapolio, and report the same to the board.”

This resolution limits the employment of counsel to infringements and the like of sapolio.

At the meeting held July 16, 1877, it was reported that C. A. Seward, Esq., and J. H. Hull, Esq., had been retained under this resolution.

The by-laws (art. 4) provide that the president shall appoint and discharge all employees subject to the approval of the board. He shall have general charge of and supervision over all the business of the company, and over all its employees, and he shall do and perform all acts incident to the position of president, authorized or required by the general law under which the company is organized. There is nothing in the minutes of the corporation authorizing the employment of the plaintiff as counsel to defend the five trustees against the application made by Mr. Morgan, nor is there any implied authority in the president under the provision of the by-laws just

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referred to, which authorized him (the president) to do any act or thing except those acts and things which were incidental to his position or required by the general law under which the company was organized.

We must therefore find the proof of the plaintiff's employment in the evidence. The plaintiff testified that Mr. Simons, Edward Ellsworth, Henry Ellsworth and Mr. Sturges (four of the trustees) asked him to lay aside everything in order "to protect them from the charges of fraud and conspiracy" made in connection with the contested election. The plaintiff further testified: "I was told by these gentlemen that they were charged with fraud; their characters were attacked; their business character and integrity, etc., assailed." Such an employment, under the decisions cited, is an individual employment by the four persons named, and not an official employment by the corporation in a matter in which it is pecuniarily interested. The plaintiff must therefore seek his compensation from the individuals who employed him, as he has no legal claim therefor against the defendant corporation. True, the corporation was made a nominal party defendant to the controversy, but it had no pecuniary interest therein. Whether the plaintiff might lawfully charge a fee for looking out for its interest in the controversy, need not be discussed, because no separate charge for this specific service has been made or proved, and the cause was tried and must be disposed of on the general ground that the defendant is either liable or not liable for the services rendered in defending the trustees against the charges of fraud and conspiracy made in the election contest.

The plaintiff claims that even under the authority of *Harrison v. First Presbyterian Church* (46 Conn. 529) his claim against the corporation is authorized, and he cites the following language of a learned text-writer in reference to the rule declared in that case: "Courts consider the corporate rights somewhat liberally, and therefore if

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legal proceedings be necessary to protect the mayor or other members of the governing party in the discharge of his functions, or to secure the corporation against the doing of acts which may, though indirectly, affect its interests, the costs of such proceedings may be defrayed out of the corporate assets," the purport of which, as I understand it, is that although perhaps not legally liable, the corporation may, in such a case, after officially determining that the act was for the benefit of the corporation, defray the costs of the proceedings out of the corporate assets. The corporation in the present case has not chosen to defray these expenses out of the corporate funds, nor has it officially determined that the services were in any way beneficial to it, nor has it in any official way recognized its liability to pay for such services.

In *Holdsworth v. Mayor, &c.*, 11 *Adol. & Ell.* 490, which is cited to sustain the above proposition, the corporation, after determining that the act was beneficial to it, under its official seal, executed a bond to pay for the services rendered. The court held the corporation liable. DENMAN, Ch. J., said: "Even if the plaintiff had been the only member whose title was disputed, it is possible that the defense might justifiably have been ordered at the general expense; for the rights of the corporation might have depended on the result; and if they had instructed him to defend under such circumstances, the bond would have been given for a proper consideration."

The corporation in that case in an official manner having recognized the propriety and validity of the debt, LITTLETON, J., said: "We are at liberty to suppose the quo warrantos brought under such circumstances that the existence and welfare of the corporation might depend on their result." The bond in that case created the privity of contract necessary to the maintenance of the action.

In the present instance, the corporation has declined to recognize the claim or to appropriate funds for its payment. It cannot be coerced to do either. If the cor-

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poration sued had given a bond to pay the plaintiff's bill, the case last cited might have been applicable. As no such obligation was given, it is unnecessary to consider whether that case is in accord with the American authorities upon the same subject. While it is an elementary rule that necessary expenses incurred in the execution of a trust or in the performance of official duties thrown on parties and arising out of the situation in which they are placed, may be paid by such parties without any express provision for that purpose out of the funds in their hands belonging to the trust, subject only to the final approval of the court in settling their accounts, yet the principle stated is for the protection of the trustees, and does not aid the plaintiff, nor does it give him a claim against the corporation.

The plaintiff's position may be likened to that of an attorney who performs professional services for the benefit of an estate; his remedy is not against the estate, but against the trustee personally, and the latter is left to seek reimbursement out of the trust funds (*Wilcox v. Smith*, 26 *Barb.* 316; *Bowman v. Tallman*, 2 *Robt.* 335; *Van Zandt v. Myers*, 7 *Weekly Dig.* 390; *Ferrin v. Myrick*, 41 *N. Y.* 315; *Mygatt v. Wilcox*, 45 *Id.* 306; *Austin v. Munroe*, 47 *Id.* 360; *Davis v. Stover*, 58 *Id.* 471; *Stanton v. King*, 63 *Id.* 609; *New v. McNicoll*, 73 *N. Y.* 127).

Under the circumstances it is clear that the plaintiff has no cause of action against the corporation, but must seek compensation for his services from the trustees who employed him.

The second bill is for services claimed to have been performed in an injunction suit to restrain the majority directors from passing what is termed illegal amendments to the by-laws. The action was against the five trustees individually, and the corporation was not a party. The injunction applied for was obtained, and was, after argument, continued. The suit was eventually compromised and discontinued. The plaintiff was employed by the

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majority trustees to oppose the injunction applied for, and he must, for the reasons before stated (all of which are equally pertinent to this branch of the case), seek his compensation from them, leaving them to seek such redress as they may be advised.

For these reasons there must be a judgment for the defendant on the special verdict and on all the issues.

City Court.

Trial Term—June, 1884.

HULL *against* CARDWELL.

The defendant as a broker rented the plaintiff's premises to a customer of his for six months and five days at the agreed rental of \$500 for the term. The defendant claimed brokerage for the entire year. *Held*, that the brokerage was limited to the agreed rental and did not extend to the entire year.

MCADAM, Ch. J.—That the defendant collected \$166.66 rent for the plaintiff is conceded. The question in dispute is whether, upon a rental of six months and five days, at the rate of \$1,000 per year, the defendant is entitled to brokerage at 2½ per cent. on \$500, the rental for the term, or to brokerage at that rate for an entire year. The evidence satisfies me that in the absence of an express agreement, the customary rule is to allow percentage on the actual or agreed rental. This custom is reasonable and fair, and hence legal. To give effect to a special custom to charge commissions on rent for a period of time extending beyond the term of the lease, would be to allow compensation on a theoretical, constructive or imaginary basis rather than on that fixed by the deliberate agreement of the contracting parties. Such a peculiar custom

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is unreasonable, and cannot be enforced in the absence of proof that the plaintiff knew of its existence (*Boardman v. Gillard*, 1 *Hun*, 22.) ; *Bassett v. Lederer*, *Id.* 280). The defendant has no doubt acted in good faith, and under the belief that his counter-claim was just.

The plaintiff is entitled to judgment for \$166.66, less \$12.87 commission at 2½ per cent. on the rent for the term, to wit, \$153.79.

City Court.

Special Term—July, 1884.

HOLMES, BOOTH & HAYDENS *against*
OTTO STIETZ.

A person contracting with a corporation is estopped from questioning its corporate existence.

Decision on motion for judgment.

MCADAM, Ch. J.—The complaint alleges that the plaintiff is a foreign corporation, created under the laws of the State of Connecticut, and that, by indenture of lease in writing made between it and the defendant, the defendant hired from it certain premises for a specified term, and at a stated rent. It then alleges that the defendant failed to pay the quarter's rent which became due May 1, 1884, and for this rent, amounting to \$500, the plaintiff demands judgment.

The defendant by not denying has admitted the execution of the indenture sued upon (Code, § 522).

The defendant in his answer attempts to question the corporate charter of the plaintiff, but this he cannot do. He contracted with it and is estopped from disputing its

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corporate existence (*Weed Sewing Machine Co. v. Kaulback*, 3 *Thomp. & C.* 304; *Erie Savings Bank v. Baldwin*, 22 *Alb. L. J.* 134; *Buffalo City R. Co. v. New York Central R. R. Co.*, *Id.* 134; *Commercial Bank v. Pfeiffer*, 22 *Hun*, 327; *Palmer v. Lawrence*, 3 *Sandf.* 161; *Steam Navigation Co. v. Weed*, 17 *Barb.* 378; *White v. Coventry*, 29 *Id.* 305; *Sands v. Hill*, 42 *Id.* 651; *White v. Ross*, 15 *Abb. Pr.* 66; *Hyatt v. Esmond*, 37 *Barb.* 601; *Same v. Whipple*, *Id.* 595). It appears by the charter granted by the Legislature of Connecticut and offered in support of the motion, that the plaintiff was regularly incorporated. Under these circumstances the justice at the trial term would be obliged to direct a verdict for the plaintiff. The jury would have nothing to pass upon. In such a case it is difficult to imagine any defense which the defendant may have against a motion like the present. It follows that the motion for judgment must be granted, with costs.

Formal defects in Organization of Corporation not available to a person dealing with and afterwards sued by it.

Formal defects in the proceedings to organize a corporation, if any such exist, are not available to a person dealing with and afterwards sued by it (*Persse & Brooks P. W. v. Willett*, 1 *Robt.* 131; 37 *Legal Intell.* [Pa.] 434), and proof of the publication of the certificate of the comptroller of the currency is unnecessary (*Merchants' Exchange National Bank of Memphis v. Cardozo*, 3 *Jones & Spencer*, 168).

In the case of *Mokelumne Mining Co. v. Woodbury* (14 *Cal.* 424) it appeared that the statute required the certificate of incorporation to be filed with the county clerk, and a duplicate with the secretary of state, and that, *when so filed, the organizers should be a corporation*. The court *Held*, that as to third persons the filing in the clerk's office was all that was required, and that *the failure to file the duplicate was an omission, the remedy for which resided in the State alone, in a direct proceeding* (see also *Roundel v. Fay*, 32 *Cal.* 354; *Hamilton v. President, &c.*, 24 *Ill.* 22). In *Tarbell v. Page* (24 *Ill.* 46) it was *held* that although a corporation fails to file the necessary certificate at the office of the secretary of state in pursuance of the statute, *yet it is to be deemed a corporation with respect to third persons in all pro-*

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ceedings, except a quo warranto or some direct proceeding by the State to try the validity of the organization.

In New York, the policy of the law, as indicated in the statute, and old Code, has been to limit and restrict the right of the defendant to question the corporate existence of a plaintiff to cases in which the defendant in his answer gives notice of such an intent by pleading *affirmatively* in the answer that the plaintiff is not a corporation (3 R. S. 5 ed. 755, § 3; *Mutual Ins. Co. v. Osgood*, 1 Duer, 708; *Holyoke Bk. v. Haskings*, 4 *Sm. & F.* 675; *Metropolitan Bk. v. Lord*, 1 *Abb. Pr.* 185; 30 *Barb.* 491; 5 *Bosw.* 716; 13 *How. Pr.* 270; and kindred cases); and the courts, even under the old Code, held that a mere general denial will not call for this proof, and that the defendant must expressly plead that the defendant is not a corporation (*Bank of Genesee v. Patchin Bk.* 13 *N. Y.* 314; 7 *Bosw.* 493) before it can be required.

In the case of the Methodist Union Church v. Pickett (19 *N. Y.* 482), the court of appeals, while recognizing the general rule that a corporation, whenever it brings a suit, is bound to prove that it was legally incorporated, in all cases in which the issue is or may be properly raised, says, "The rule established by law as well as by reason is, that parties recognizing the existence of corporations by dealing with them, have no right to object to any irregularity in their organization or any subsequent abuse of their powers, not connected with such dealing. As long as these are overlooked or tolerated by the State, it is not for individuals to call them in question." In the case of Trustees of Vernon Society v. Hills (6 *Cow.* 23), which was an action brought by the trustees of a religious corporation, SAVAGE, Ch. J., used the following language: "The plaintiffs have acted as trustees upon the matter in question, and in bringing their suit, *colore officii*: and before an objection to their right can be sustained by the defendant, on the ground that they were not regularly elected, he must show that proceedings have been instituted against them by the government, and carried on to a judgment of ouster." In the case of the Leonardsville Bank v. Willard (25 *N. Y.* 574), the court of appeals held, "that as against one who has dealt with a banking association, organized as such under the general law, its incorporation is sufficiently proved by the recording of its articles in the county clerk's office, and its user of corporate powers under *color* of incorporation, without proof that the articles were filed in the banking department." There must be a *user* under the franchise to estop persons from questioning corporate existence (69 *N. Y.* 518).

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Documents omitted at the Trial may be read at General Term to sustain a judgment.

Authenticated papers may be read at the general term to sustain a judgment (*Jarvis v. Sewell*, 40 *Borb.* 435 ; 1 *Suremey*, 484 ; 45 *N. Y.* 166 ; 2 *Sandf.* 718). This was allowed in the case of the Bank of Charleston v. Emeric (2 *Sandf.* 718, *supra*), in which it was claimed that the plaintiff's incorporation was imperfectly proven on the trial, and Chief Justice OAKLEY, on behalf of the court, allowed the plaintiffs to read, in support of the judgment, an exemplification in due form of their act of incorporation by the Legislature of the State of South Carolina, and after referring to the rule authorizing such proof after judgment, the learned justice said : "It is surely not worth while to send this cause back for another trial, merely to have this document, on which no question arises, given in evidence."

Such objections are technical, and the cases show a disposition to do even and substantial justice between suitors upon the merits of their controversies without encouraging technical objections which are not insurmountable in their character (see cases on this subject collated in *Baylies on New Trials*, 161, 162).

**Goods Sold and Delivered—Principal and Agent—Corporation—
Ultra Vires.**

Supreme Court of Massachusetts, SLATER WOOLEN CO. v. RUFUS LAMB ; Worcester, January, 1887.

Action of contract, upon an account annexed, for goods sold and delivered to the defendant.

At the trial in the superior court, before BACON, J., the plaintiff introduced evidence tending to show that the defendant had purchased and received the goods as charged in the plaintiff's declaration; but the defendant denied having bought the goods of the plaintiff or at plaintiff's store. The plaintiff also introduced evidence of its incorporation, "for the purpose of manufacturing fabrics of wool and worsted or of a mixture thereof with other textile materials." It was agreed that the business was carried on in the name of Samuel Slater & Sons, until July 1, 1876, and in the name of H. N. Slater between July 1, 1876, and March 1, 1877, and after March 1, 1877, it was carried on under the name of the Slater Woolen Co. The defendant set up that the plaintiff had no power under its corporate act to carry on the business of selling groceries, dry goods, and kindred articles ; and also that, if the defendant ever had the goods named in the plaintiff's declaration, he did not purchase them

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from the plaintiff, but from Samuel Slater & Sons and H. N. Slater. The defendant produced pass-books showing the account to have been in the name of Samuel Slater & Sons, and H. N. Slater, and not in the name of the Slater Woolen Co. It also appeared that the defendant was not in the employ of the plaintiff, or of Samuel Slater & Sons, or H. N. Slater, during any part of the time covered by the declaration, and did not receive these goods in payment for services rendered the plaintiff corporation. There was evidence tending to show that the defendant had no knowledge or notice that the plaintiff was the owner of said store from which the articles sued for were purchased. The plaintiff contended that the Slater Woolen Co. was the sole owner and furnished all the money to carry on the business; and that it did carry on the business in the name of S. Slater & Sons, and H. N. Slater as its agents, but did not contend that it ever gave notice to the world that they were its agents in any way. It also appeared that the Slater Woolen Co. furnished the money the business was carried on with, and charged Samuel Slater & Sons and H. N. Slater interest on the money they used, and gave them credit for interest on the money deposited with it by Samuel Slater & Sons and H. N. Slater; and the books of H. N. Slater, as introduced by the plaintiff, showed that H. N. Slater was indebted to the Slater Woolen Co. on March 1, 1877, in the sum of \$11,497.95. These books showed that said amount was transferred as a balance to the plaintiff by charging said balance to the plaintiff's account, and crediting the same to the account of H. N. Slater. There was evidence tending to show that the business was done by S. Slater & Sons and by H. N. Slater as the agents of the plaintiff.

The defendant asked the judge to instruct the jury as follows: "1. Corporations are limited in their powers by their act of incorporation. 2. Corporations have no power to appoint agents for the transaction of business not authorized by their act of incorporation. 3. In order to entitle the plaintiff to recover, they must show that they are legally incorporated for the purpose of carrying on the business for which this action is brought. 4. If the jury find that, during the time covered by the plaintiff's bill of items, the business was carried on by S. Slater & Sons and H. N. Slater, then the plaintiff cannot recover, and it would make no difference whether the plaintiff furnished the capital or not."

The judge declined to give the first three rulings requested; stated that he would give the fourth "in a modified form;" and instructed the jury, in substance, as follows: "You are to determine whether this business was really the business of the Slater Woolen Co. during

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the time and while it was done in the name of H. N. Slater and S. Slater & Sons, because it is evident that this action could not be maintained for anything except that which was done in the name of the Slater Woolen Co., and unless it was the business of the Slater Woolen Co. when it was done by H. N. Slater and by S. Slater & Sons. It would not make any difference if this business was the business of the Slater Woolen Co., the latter would have a right to bring its actions in its own name, although it had done business by the name of its agent H. N. Slater, and S. Slater & Sons. And whether it was or not the business of the Slater Woolen Co. depends not upon the fact whether the Slater Woolen Co. furnished the capital to H. N. Slater and S. Slater & Sons, and charged them interest on it, and did the business not as the Woolen Co., but for and in behalf of H. N. Slater and S. Slater & Sons, then of course this action could not be maintained for anything that was sold by H. N. Slater and S. Slater & Sons; but, if H. N. Slater and S. Slater & Sons were mere agents with an undisclosed principal of the Slater Woolen Co., doing business for the Slater Woolen Co., then this action, although it was not known to the defendant, might be maintained by the Slater Woolen Co. You will see then the importance of distinguishing carefully between the business of the Slater Woolen Co. done by its agent as an undisclosed principal of the transaction, and the business of H. N. Slater and S. Slater & Sons done by themselves. The burden is upon the plaintiff to establish the fact, by a fair preponderance of the evidence, that the business was done for and in behalf of the Slater Woolen Co. alone, not simply that they loaned the capital to H. N. Slater and S. Slater & Sons. If you find that the Slater Woolen Co. was a corporation duly established, and there is evidence of that, and it is sufficient for you to find the fact that that was a corporation duly established and trusting by its corporate capacity, the plaintiff can recover, if you find this first issue which I have been stating to you in favor of the plaintiff."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. A. Gile, for the defendant.

W. S. B. Hopkins, for the plaintiff.

FIELD, J.—The substance of the defendant's contention is that the plaintiff, having been incorporated "for the purpose of manufacturing fabrics of wool and worsted or of a mixture thereof with other textile materials," could not, by and in the name of persons who were, in fact, keeping a store as its agents, but whose agency was undisclosed, sell groceries, dry goods and other similar articles to

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the defendant, who was not employed by the company, and then maintain an action against him to recover either the price or the value of the goods sold. If the goods were the property of the plaintiff, and were sold by its agents, the plaintiff can sue as an undisclosed principal. *Chester Glass Co. v. Dewey*, 16 *Mass.* 94. There is a distinction between a corporation making a contract in excess of its powers and making a contract which it is prohibited by statute from making, or which is against public policy or sound morals, and there is also a distinction between suing for the breach of a contract wholly executory and suing to recover the value of property which has been received and retained by the defendant under a contract executed on the part of the plaintiff. If it be assumed, in favor of the defendant, that the contracts of sales in the case at bar were *ultra vires* of the corporation, they were not contracts which were prohibited, or contracts which were void as against public policy or good morals, the defect in them is that the corporation exceeded its powers in making them. The defendant, under these contracts, has received the goods, and retained and used them. We think that the corporation can maintain an action of contract against the defendant to recover the value of the goods (*Whitney Arms Co. v. Barlow*, 63 *N. Y.* 62; *Woodruff v. Eastern R. R.*, 93 *Id.* 107; *Nassau Bank v. Jones*, 95 *Id.* 115; *Pine Grove Township v. Talcott*, 19 *Wall.* 666, 679).

Exceptions overruled.

City Court.

Trial Term—July, 1884.

THOMAS OGLE *against* KING & GOODHEART.

Stable-keeper's lien. The statute giving a livery-stable-keeper a lien is a remedial one, and must be liberally construed to advance the remedy. It was intended to give a lien where none existed before. An inchoate lien attaches from the moment the horses enter the stable. It is waived if the statutory notice be not given, and it ripens into an effective lien the moment the required notice is given, and relates back and embraces all charges due.

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Trial by the court without a jury.

McADAM, Ch. J.—The statute (*L.* 1872, ch. 498; *L.* 1880 ch. 145), gave the plaintiff, as stable-keeper, the right to detain the horses until all the charges under the agreement for care, keep and board were paid, provided the notice in writing of the intention to enforce such lien was given to the owner as required by said statute. The statutory notice in writing was given on May 15, 1884. The plaintiff had not, up to this time, abandoned his lien, and it became effective from the time the notice was given, and embraced the entire claim.

The statute is a remedial one, and must be liberally construed to advance the remedy. It was intended to give a lien where none existed before. The inchoate lien attaches from the moment the horses enter the stable; it is waived if the statutory notice be not given, and it ripens the moment the notice is given into a complete statutory lien relating back and embracing all the charges due.

The words in the act,—“from the time of giving of such notice,”—mean that from this time the lien becomes complete; but when made effective by the notice it covers all charges for care, keep and board, while such horses were cared for by the stable-keeper. In fact section one expressly provides that the lien intended to be given authorizes the stable-keeper “to detain such horse or horses until all charges . . . shall have been paid.” (See *Eckhard v. Donohue*, 9 *Daly*, 214.) It will not do, in the face of this language, to hold that the stable-keeper may detain the horses until the charges due “from the time of giving notice” are paid, for the statute in express terms provides that he may detain them “until all charges, &c., shall have been paid.” A person doing work or furnishing material to a building may acquire a lien thereon by filing a notice with the county clerk. The lien dates from the time of filing, but embraces work and material done and furnished prior thereto. The lien is inchoate in

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its nature until the notice is filed, and is abandoned if the notice is not filled, but when filed it embraces all lawful charges up to that time. The cases are somewhat analogous. The defendant Goodheart, as the general assignee of King, succeeded to the rights of his assignor, and these were subject to the inchoate right of lien which matured on the service of the notice. A person purchasing real estate relies, of course, upon the public records, and if there be no lien upon file at the time of the purchase, he may be compelled to take and pay for the property, so that a lien subsequently filed against the property cannot impair the title he was obliged to take. In the case of a stable-keeper's lien, no record is required to be kept, and the only mode in which a purchaser can ascertain whether there is a lien or not, is to inquire of the stable-keeper. The horses were in possession of the stable-keeper under an agreement with the assignor, at the time Goodheart accepted the assignment. This was known to the assignee, and was constructive notice to him of the right of lien under the statute.

The general assignee takes title for the benefit of creditors, and must take it *cum onere*. The law will not give him greater rights than his assignor. He, figuratively speaking, steps into the shoes of the assignor and succeeds to nothing more. To hold that the lien may be defeated by a mere transfer, to which the stable-keeper is not a party, would be to defeat the apparent object of the statute, and render it nugatory.

The law meant to give the stable-keeper a right which he might make available or not, at his option, but no one else can divest him of it. Under the circumstances I find that there was a valid lien on the three horses which belonged to King, and were transferred to Goodheart, but as to the one which belonged to neither I dismiss the complaint. It follows that there must be judgment in favor of the plaintiff for the amount of the charges on the three horses.

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Upon submitting a decree in accordance herewith it will receive my fiat.

This opinion was approved of in *Lessells v. Farnsworth*, 3 *How. Pr. N. S.* 364.

City Court.

General Term—October, 1884.

CHARLES G. MARTIN ET AL. against ELIZA
RILLINGS.

An owner of real estate may employ as many brokers as he pleases, and is liable only to the one who finally procures the customer.

Where there are two brokers, the one who first calls the customer's attention to the property is not necessarily entitled to brokerage, and if the other broker in good faith and without collusion consummates the sale he is entitled to the commission.

In an action by the first broker it is competent to prove that the owner paid the brokerage to the second party.

Appeal from a judgment entered upon a verdict in favor of the plaintiffs.

James Flynn and *E. H. Benn*, for defendant and appellant.

S. A. & D. J. Noyes, for plaintiffs and respondents.

MCADAM, Ch. J.—The action is for brokerage in procuring a tenant for certain premises belonging to the defendant, and the substantial question presented is whether the plaintiffs or one Charles S. Peck procured the tenant to whom the defendant leased the property.

The plaintiffs are real estate brokers, and Peck is also a broker. The plaintiffs were employed to find a tenant,

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and Peck was likewise employed. The defendant had the right to employ as many brokers as she pleased, and was obligated to pay the one who negotiated a contract on her terms and no other; for to entitle a broker to commissions it is essential that he shall be the procuring cause of the contract finally made (*White v. Twitchings*, 26 *Hum*, 503). The plaintiffs were employed to find a tenant willing to pay \$3,000 per year; this they failed to do. They called Dewey's attention to the property, and introduced him to the defendant, but he would not agree to pay the required rent. Finally Dewey saw Peck, the other broker, and through him an agreement was consummated by which Dewey took the property in January, 1884, at \$2,250 per year after May 1, 1884, and agreed to pay \$300 for the intervening time—to wit, to May 1, 1884. This arrangement was negotiated in Peck's office. The plaintiffs were not parties to the negotiation and did not aid in its final consummation. Peck was therefore the procuring cause of the letting—actually made—and earned the commission.

If there had been no intervening agency, and the defendant had let the premises to Dewey, even at a reduced rent, the plaintiffs might with some propriety have claimed that their efforts led to the contract, and that they were in consequence entitled to the brokerage. But there was an intervening agency, and Peck seems to have brought about a successful consummation of the contract made. As between the two rival brokers, Peck was the procuring cause of the letting.

Where there is, as in this case, a dispute between rival brokers, it is difficult at times to draw the line and decide which in law earned the commission claimed; but it is clear to us from the evidence that Peck succeeded in bringing about a meeting of the minds of the parties in interest—a duty which the plaintiffs undertook but failed to perform. Dewey, the person who hired the premises, was not called as a witness upon

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the trial. His evidence would have aided us materially in determining the question of procuring cause. His testimony may be procured upon the next trial of the action. Why he was not produced as a witness does not distinctly appear. Upon the trial the plaintiff, William C. Martin, was asked about him, and said he had not subpoenaed or requested him to attend, and when asked, "Didn't you get the trial of this action postponed once or twice on the ground that he was a material witness for you?" the plaintiff's counsel objected to the question, and the objection was sustained and the defendant excepted. The defendant, upon the trial, offered to show that she had paid Peck the brokerage claimed. The plaintiff objected to this evidence, and the trial judge sustained the objection, to which the defendant also excepted. We think that, in view of the facts, this evidence was competent, as tending to show the good faith of the defense. True, it was not conclusive against the plaintiffs, but it was not wholly irrelevant.

Upon the entire case, it is clear to us that the verdict cannot be sustained. The judgment must, therefore, be reversed, and a new trial ordered, with costs to the appellant to abide the event.

NEHRBAS and HYATT, JJ., concur.

City Court.

General Term—October, 1884.

BERTHA SMITH, PLAINTIFF AND RESPONDENT, *against*
L. F. GENET, DEFENDANT AND APPELLANT.

Where a lease for a term exceeding one year is executed for the lessor by an agent without written authority, the lease is void, and

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the lessee is liable only in case he takes possession, and then only for the time he actually occupies the premises.

Effect of subsequent ratification. The fact that the lessee abandoned the premises may be proved under a general denial.

Appeal from judgment entered on a verdict directed by the trial judge in favor of the plaintiff.

I. N. Williams, for defendant and appellant.

A. C. Fransioli, for plaintiff and respondent.

MCADAM, Ch. J.—The action was brought to recover the rent for the months of July and August, 1883, of premises No. 403 West Twenty-second street, in the city of New York. The action is on a written lease, under seal, subscribed as follows:

L. FRANKLIN F. GENET [L. s.]

BERTHA SMITH, by J. B. SMITH, Agt. [L. s.]

The lease bears date March 13, 1883, and is for the term of one year and one month, to wit: from April 1, 1882, till May 1, 1884. The main defense is that the lease, being for a longer period than one year, is void, because not signed by the plaintiff, or her agent thereunto duly authorized in writing. The statute (2 *Edm. R. S.* 139, § 6), provides that "no estate or interest in lands, other than leases for a term not exceeding one year . . . shall hereafter be created, granted, assigned, surrendered or declared unless by act or operation of law, or by a deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing."

This provision has been judicially considered in several cases. In *Porter v. Bleiler* (17 *Barb.* 154), the court held that such a lease "created no estate or interest in the land, the agent having no written authority to execute it." The court continued: "Still I see no objection to referring to it for the purpose of regulating and ascertaining the rights of the parties during the actual existence

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of the tenancy, in analogy to the principle that when the tenant enters under a parol lease, void by the statute as having been for more than a year, and occupies the premises, he is liable to pay the rent specified in the contract, according to its terms, for the time he occupies."

In *Post v. Martens* (2 Robt. 437), the court held that a lease signed as agent for the lessor, by a person not having authority in writing so to sign, cannot create the estate purported to be created in it, and is rendered void by the statute before referred to.

In *Thomas v. Nelson* (69 N. Y. 118), it was held that a parol lease, void under the Statute of Frauds, because for a longer period than one year, is not valid for that period; that if the tenant enters and occupies under it, he may be compelled to pay for the use and occupation, but cannot be compelled by virtue of the lease to pay for a period longer than he actually occupies. Under these authorities it follows that the lease sued upon is under the statute void, that while it may regulate the amount of rent to be paid; if the tenant takes possession, he is liable only for use and occupation, and cannot be compelled to pay for a period longer than he actually occupies. This is the construction placed upon the law in *Prial v. Entwistle* (10 Daly, 398), and is controlling.

Upon the trial, the defendant offered to prove that he vacated the premises before June 1, 1883. The court refused to permit the proof, because the fact had not been pleaded in the answer by way of defense, and defendant excepted. We think this was error.

The defendant, as before remarked, was liable only on the theory of actual occupation. The lease being void, it was for the plaintiff to prove that the defendant was in possession, and the defendant certainly had the right, under his "general denial" in the answer, to negative the fact of actual occupation. In short, the defendant offered to prove that the only fact on which his liability depended did not exist. This he should have been permitted to do.

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It is claimed by the plaintiff that the lease, although "void" by the statute, has been made valid by ratification. A void thing, as we understand it, is in legal effect no thing, and it may be doubtful whether a void act is capable of ratification against the wish of the other parties to the transaction.

The complaint declares on the void lease, and ratification is not alleged. The alleged ratification was executed June 9, 1884. The action was commenced in August, 1883, so that the ratification instrument was executed nearly a year after the action was commenced. We think the alleged ratification is inoperative, because if the defendant had a valid defense at the time issue was joined, it cannot be taken away by the act of the plaintiff subsequently executed.

In *Andrews v. Aetna Life Ins. Co.* (92 N. Y. 597), the court held that a principal, upon being informed of an unauthorized act of an agent, has a right to elect whether he will adopt it or not, and, so long as the condition of the parties is unchanged, cannot be prevented from such adoption by the fact that the other party prefers to treat the contract as invalid. But, in the present case, the defendant abandoned the premises long before the alleged ratification. He thereby exercised in a legal method his right to withdraw from any obligations the law imposed upon him, in respect to the invalid contract. After the condition of the defendant had become changed and his liability had been legally discharged, the plaintiff could not, by mere ratification, revive the discharged liability.

Under the circumstances, we have nothing to do but reverse the judgment and order a new trial, with costs to the appellant to abide the event.

NEHRBAS and HYATT, JJ., concur.

Poser v. Kahrs.

City Court.

General Term—October, 1884.

BARBARA POSER *against* GUSTAV KAHRS.

Breach of promise to marry. Damages. The plaintiff, a widow, forty six years of age, who had buried two husbands, sued the defendant, who was her junior in years, for breach of promise to marry. There was no allegation of seduction, and no proof that the defendant owned any property or had any wealth. *Held*, that under such circumstances, it could not be claimed that the plaintiff's prospects were blighted, her fond hopes crushed, or her proud spirit broken. Her age and condition would indicate that she had arrived at that time of life when disappointment becomes the rule rather than the exception; and that a verdict for \$2,500 was excessive.

Appeal from judgment entered on verdict in favor of the plaintiff for \$2,500 damages for the breach of a promise to marry, and from an order denying a motion made for a new trial.

John Hardy, for defendant and appellant.

F. J. Dupignac, for plaintiff and respondent.

BY THE COURT.—MCADAM, Ch. J., and HYATT, J.—The plaintiff is a widow, having buried two husbands before she formed the acquaintance of the defendant, and the latter a widower, having buried his wife before he formed the plaintiffs' acquaintance. They did not meet in the usual way, for the plaintiff describes the manner of their acquaintance as follows:

"Q. State when and how you became acquainted with the defendant?

"A. Mrs. Buckholz came up stairs to me and asked me

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to come down, there was a gentleman wanted to see me, and so I went with her, and when we went down she made me acquainted with the defendant.

"Q. Who is Mrs. Buckholz?

"A. The lady who keeps the saloon down stairs.

"Q. German lager-beer saloon?

"A. Yes, sir.

"Q. You were introduced to Mr. Kahrs?

"A. Yes, sir; and then we were talking at night together about family affairs. That was all for that night, and then I went up stairs.

"Q. After you had been introduced to Mr. Kahrs when did you next see him?

"A. I guess a couple of days after.

"Q. Where?

"A. In the same place again.

"Q. State what took place between you and him then?

"A. The same talk over again; we did not have much to say.

"Q. About your family and his family?

"A. Yes, sir.

"Q. When did you see him next?

"A. Most every day. He came every day in the place, and when he was in he always wanted me down; he sent up for me to come down.

"Q. And you went down and spoke to him?

"A. Yes, sir.

"Q. When first, if at all, was the subject of marriage spoken of?

"A. About three or four months after the introduction.

"Q. State where it was?

"A. He went outside with me and asked me whether I wanted to be his wife.

"Q. What did you say?

"A. I said, I don't know, Mr. Kahrs; I am afraid I am too old for you, and I am too poor, and there are so many young women after you; and I thought he could have a

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younger woman than me. I did not say yes. I did not think he meant it at the same time.

"Q. When was the next conversation you had after that?

"A. It was right after that again. He came every day, and wanted to see me every day. He said he had a daughter and she was kinder sickly, and, he said he wanted to get married because he must have help in the house; he did not want to be alone with the girl; his daughter wanted help.

"Q. What answer did you give him to that?

"A. I had a step-daughter, and I thought the two daughters would not agree very well, and I said I wanted to wait a little longer because my daughter might get married, she was having company, or his daughter might get married after she got well again. I did not want to get married at that time. I was always afraid that the man was too rich.

"Q. When did you next have a conversation with him?

"A. Well, I don't know that exactly. We always had the same conversation.

"Q. Day after day?

"A. Day after day."

This is substantially the courtship as described by the plaintiff. The defendant finally refused to marry the plaintiff, and she brought the present action to recover damages for the breach. She subsequently testified to a mutual promise and breach. The jury awarded her \$2,500, and the main question before us is whether it is excessive, or about right.

The plaintiff in her evidence has referred to the defendant as a "rich" man; but there is nothing in the case proving his wealth or social position, from which we can tell in dollars and cents what the plaintiff has lost by the breaking off of the contemplated match. Seduction is not alleged in the complaint, and was not proved upon the

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trial, so that element of damage cannot be considered or compensated for.

Sedgwick, in his work on Damages (6 ed. p. 248), says : "To the general rule another exception also exists, that of breach of promise of marriage. In this action, though in form *ex contractu*, yet it being impossible from the nature of the case to fix any rule or measure of damages, the jury are allowed to take into consideration *all the circumstances*, and, provided their conduct is not marked by prejudice, passion or corruption, they are permitted to exercise an absolute discretion over the amount of compensation."

The court upon appeal, however, must determine whether their discretion has been exercised in a judicial manner. In reviewing the question of damages due regard must be had to the social status of the parties—their condition in life, and these are to be considered in the light of the facts and the surrounding circumstances.

The plaintiff is forty-six years of age, and, as before remarked, has buried two husbands. The age of the defendant does not appear, although the plaintiff testifies that on the occasion when marriage was first suggested, she said to the defendant, "Mr. Kahrs, I am afraid I am too old for you."

From this we infer that the defendant is not the senior of the plaintiff but her junior. No preparations were made for the wedding, no engagement party had been celebrated ; in fact, no day was fixed for the nuptials. When marriage was suggested, the plaintiff testifies, "I did not think he meant it." Perhaps he did not. The defendant's conduct leads to the inference that he did not.

Under such circumstances, it can hardly be claimed that the plaintiff's prospects were blighted, her fond hopes crushed and her proud spirit humiliated or broken. Her age and condition would indicate that she had arrived at that time of life, when disappointment becomes the rule rather than the exception. When marriage becomes a matter of interest rather than the spontaneous outburst

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of love,—for it is hard to believe that nature keeps alive in the breast of the widow, who has buried two husbands, that warmth of affection and ardor peculiar to youthful hearts,—nor can we believe that the plaintiff, already bowed down with grief at the loss of two husbands, is at the age of forty-six heartbroken at the mere loss of an opportunity of getting another. Nature has not so ordained, and we are to look upon the facts as they are, and must consider the age and condition in life of the parties, without indulging in sentimental imaginations and fancy.

It does not follow, however, that the defendant had the right to promise to marry the plaintiff, and then jilt her because of these facts. He has broken his promise, and must pay the legitimate damages resulting from the breach; and the question to be determined is, what loss has the plaintiff (all things considered) fairly suffered from it?

The jury in their discretion have fixed the amount at \$2,500. In some cases this would not be enough. In others too much. Verdicts for larger amounts have been sustained, but there were circumstances which justified the recoveries had. Without imputing to the jury either prejudice, passion or corruption, we think they have allowed their sympathies for the widow to work on their liberality, and have under the circumstances allowed too much. Our experience is that juries in other cases of like character have fixed damages at a much lower figure. We think the judgment ought to be reversed, and a new trial ordered, with costs to abide the event, to the end that the damages may be assessed by another jury. If, however, the plaintiff within ten days elects to reduce the recovery to about one-third of the amount allowed,—say to \$800,—the judgment, as modified, will be affirmed, with the costs below, but without the costs of this appeal; the effect of which will be to mulct the defendant in about \$1,000, which is ample punishment for his indiscretion on

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the one hand and ample compensation for the plaintiff's grievance on the other.

The plaintiff consented to the reduction, and the judgment as reduced was paid.

City Court.

Trial Term—November, 1884.

NORTHFLEET COAL & BALLAST CO. *against*
BUDD.

Bought-and-sold note. Sale by broker. Where the terms are agreed upon, the broker should reduce them to writing in the form of bought-and-sold notes. He cannot (unless the parties consent) vary the terms agreed upon by sending to the contracting parties notes containing other terms. The effect of discrepancy between the note sent the vendor and that sent the vendee, considered.

MCADAM, Ch. J.—The only written evidence of a contract between the parties hereto is to be found in the bought-and-sold notes signed by the broker, and the question presented is whether these notes are conclusive on the parties, so as to shut out the truth. Where the terms of sale are agreed upon, the broker should reduce them to writing, in the form of bought-and-sold notes. This is the limit and extent of the broker's authority. He cannot (unless the parties consent) vary the conditions agreed upon by sending to the contracting parties bought-and-sold notes containing other terms. When the agent departs from the authority conferred, the act is not binding unless adopted. . For this reason bought-and-sold

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notes are not always conclusive on the principals (for illustrations see *Benjamin on Sales*, 2 ed. 213, 221).

The uncontradicted evidence shows that the broker told the defendant he might have the chalk in question, and that the price of the three hundred tons "would be as low as anybody else had it out of the ship." The evidence also shows that others bought portions of the same cargo of chalk at \$1.50 per ton. The three hundred tons delivered to the defendant amount, at this rate, to \$450. For this sum, with interest, the plaintiff is entitled to judgment. The subsequent offers of settlement do not conclude the parties. The sold note was sent to the defendant, who, from mere inspection, could not tell whether the price inserted was correctly stated or not, because this depended upon the price the balance of the cargo brought—a fact he did not then know. Under the circumstances, the note did not conclude the defendant, who had the right to assume that the price agreed upon was truthfully stated. The retention of the note might have concluded the defendant, if he had accepted the note and chalk with knowledge of all the facts, or if he had refused on demand to return the chalk on being informed of the facts.

But the mere retention of the note, under the circumstances disclosed by the evidence, did not impose any active duty on the defendant. If the plaintiff has been misled, it is the fault of the agent, and the remedy, if any, is against him. The questions of law which arise on bought-and-sold notes are close, but the evidence of all the witnesses unites in making the facts so clear that it would seem inequitable to enforce against the defendant, as his contract, a note which the agent of both parties admits does not contain the contract which the defendant authorized him to make.

Judgment will, therefore, be ordered in favor of the plaintiff for the \$450 aforesaid, with interest.

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Variance between bought-and-sold notes.

If the broker deliver a bought-and-sold note which materially differs,—*e. g.*, in the omitting of the warranty,—there is no valid contract (*Peltier v. Collins*, 3 *Wend.* 459. See also *Snydam v. Clark*, 2 *Sandf.* 188).

City Court.

Special Term—December, 1884.

CHARLES DUSENBURY *against* EDWARD
CANTLON.

Where the defendant agreed with two others to purchase at auction in his own name, but on joint account of the three, certain wire cloth, the funds for the purchase being furnished by the three, and the defendant subsequently sold the cloth and received the proceeds,—*Held*, that the three were not partners, and that the two might maintain separate actions at law against the defendant to recover their respective shares of the proceeds.

Decision on argument of demurrer.

MCADAM, Ch. J.—The complaint charges that about April 9, 1884, plaintiff, defendant, and one Albert Seligman entered into a contract to purchase certain wire cloth at an auction sale; that the defendant was to purchase said wire cloth in his own name, but on the joint account of the three,—himself, Seligman, and the plaintiff; each of the three was to pay one-third of the cost; that the cloth was purchased under said agreement by the defendant for \$426, one-third of which amount, viz., \$142, was paid by the plaintiff to the defendant. The complaint charges that the defendant has sold the said wire cloth, and has received the proceeds, and that the defendant has refused to settle with the plaintiff or return the \$142,

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paid as aforesaid. The three parties were joint owners of the wire cloth, the defendant sold it, and became liable to each of the other two owners for one-third of the amount realized, if the sale was authorized, and one-third of the value, if it was not. This joint ownership did not necessarily make the parties partners (*Porter v. McClure*, 15 *Wend.* 187; *Sage v. Sherman*, 2 *N. Y.* 427; *Boeklen v. Hardenburgh*, 60 *N. Y.* 9). A person whose goods have been wrongfully sold may either sue for the tort in an action of trover, or, if he pleases, claim the amount received for the sale as a debt for money received for his use (*Dacey Parties to Actions*, London ed. of 1870, p. 20). The sale made by the defendant destroyed the joint ownership of the wire cloth, and left the defendant indebted to each of the other two owners in one-third of the amount of the proceeds. A common-law action is comprehensive enough to afford the necessary relief in such a case; recourse to equity would be useless. No accounting is necessary. If the property realized \$300, the defendant owes the plaintiff \$100. The complaint sets forth nothing which requires any other mode of computation.

There is no rule forbidding one partner from suing another at law in respect of a debt arising out of a partnership transaction, if the obligation or contract, though relating to the partnership business, is separate and distinct from all other matters in question between the partners, and can be determined without going into the partnership accounts (*Crater v. Biniger*, 45 *N. Y.* 545). In the present case, there was no partnership.

In *Baldwin v. Burrows* (47 *N. Y.* 206) it is said, "Where several parties agree to purchase personal property in the name of one of them, and to take aliquot shares of the purchase without agreeing to sell jointly, there is no partnership." Here, there was no agreement to sell jointly (so far as the complaint discloses) and the defendant sold the property without permission. The plaintiff

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has his remedy at law for the wrong (*Dyckman v. Valiente*, 42 N. Y. 549). Upon the entire case, I have arrived at the conclusion that the court has jurisdiction of the action; (2) that there is no defect of parties, the plaintiff having the right, after severance of joint ownership by sale, to sue for his individual share of the proceeds; (3) that the complaint states a good cause of action.

It follows, therefore, that the demurrer must be overruled, with leave to the defendant to withdraw the same within six days and answer over on payment of \$10 costs.

See *Sturges v. Judson*, 1 City Ct. R. 256.

City Court.

Trial Term—December, 1884.

SARAH RODE *against* BENJAMIN S. DE YOUNG.

Where the mother of six children directed the defendant to deposit in bank to their credit an amount of money, and the defendant executed the direction by depositing the money in bank in his name in trust for the children,—*Held*, that a valid and irrevocable trust was thereby created.

Trial by the court without a jury.

S. G. Barnard and *M. L. Marks*, for plaintiff.

L. Cohen and *A. C. Anderson*, for defendant.

MCADAM, Ch. J.—The conceded facts establish a valid trust in favor of the plaintiff's children. The plaintiff requested the defendant to deposit in the Savings Bank, for the benefit of her six children, certain moneys then in

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his hands, amounting to \$625: to the five younger children \$100 each, and to the eldest \$125; and in order to carry out her purpose she directed the defendant to make such deposit, and pay it to the children when they severally should attain the age of twenty-one years. In compliance with this request the defendant deposited the money in the Bowery Savings Bank, in six different deposits, which were credited to accounts opened by him in his name as trustee for the children, designating their names. Subsequently the \$125 and interest were paid to the eldest son by the plaintiff's consent.

The question presented is whether the notice subsequently given by the plaintiff operated as a revocation of the trust created as aforesaid, so as to entitle the plaintiff to a return of the balance of the money. The legal effect of a parol trust is the same as one created by a more formal assurance. Thus a trust once created by parol cannot subsequently be extinguished or in any manner changed by the party creating it (*Tiffany & B. on Trustees*, 15, 16, citing *Kilpain v. Kilpain*, 1 M. & K. 531, 539; *Kilpatrick v. McDonald*, 11 Penn. 387; and see *Hill on Trustees*, 60). The defendant, having accepted the trust and undertaken the office, cannot, by his own act or upon plaintiff's demand, discharge himself from subsequent liability to the beneficiaries (*Tiffany & B. on Trustees*, 53).

The case of *Weber v. Weber* (9 *Daly*, 211), presents a different phase of the question involved. In that case the father deposited a sum in a savings bank "in trust" for his daughter, but retained possession of the bank-book. There was no delivery of the book to the beneficiary, constructively or otherwise, and it appeared that the father opened the account in that form in order to receive the highest rate of interest which the bank allowed, and that he had no intention of parting with his ownership of the money or the right of receiving it back from the bank, and further, that he had no intention of making a gift of the money to his daughter.

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In the present instance, the defendant, by the plaintiff's direction, was made trustee for the children, and, from the the time he undertook the office and deposited the money, he became chargeable with the duty and liability of a trustee. When the deposit was made the money ceased to belong to the plaintiff, and became the property of the children, as much so as if the plaintiff had told the defendant to hand over the money to them, and he had immediately done so by such direction. It is not, as the plaintiff seems to suppose, a case of agency ; it is more, it is an executed trust. A declaration of an intention to give is not a gift. The donor must do some act indicating an intention to part with all present and future dominion over the subject matter. The deposit was to be made by the trustee for the benefit of the children. Such deposit put the funds beyond recall or control by the plaintiff. When made, the relation of debtor and creditor was created between the defendant, as trustee, on the one hand, and the bank upon the other, so that the fund was by the direction of the plaintiff placed out of her control into that of the defendant or his successor, in case one should by the act of the law take his place. The trustee has ever since held the bank-books in trust for the beneficiaries. The act constituting the transfer was therefore consummated, and was not left incomplete or resting in mere intention, and the new confidential relation was completely established, whether the infants had notice of the trust or not (*Martin v. Funk*, 75 N. Y. 134).

It follows, therefore, that there must be judgment for the defendant.

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City Court.

General Term—January, 1885.

CHARLES GERHARDT, PLAINTIFF AND RESPONDENT,
against CHARLES AMMAN, DEFENDANT AND
APPELLANT.

When a contract has been terminated by the employer against the will of the contractor, the latter may waive the contract and bring his action on the common counts for work and labor generally. Pleadings should be literally construed to uphold a judgment, and amended, if need be, to conform to the facts proved, if no injustice result therefrom.

Appeal from judgment rendered at trial term.

M. J. Earley, for appellant.

Gabriel Levy, for respondent.

MCADAM, Ch. J.—We think the trial judge properly disposed of the issue before him, and that for the reasons stated in his opinion, the judgment ought to be affirmed. The main point urged on the appeal was as to whether the complaint declared upon an express contract or upon a *quantum meruit*, and whether the trial judge should have required the plaintiff to elect which of the two he relied upon. The complaint is so indefinite that it is difficult to tell the precise ground upon which a recovery was sought. The complaint alleges that the plaintiff agreed to do "certain plastering work for \$85 per floor;" that he performed the work and the defendant became indebted to him in the sum of \$202, and that the work was reasonably worth the sum." Upon the trial the plaintiff proved

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that he did "certain plastering work" and left part incomplete, because the defendant refused to make the payments in the manner agreed upon. The plaintiff was allowed to recover the reasonable value of the work done, to wit: the contract price, less what it would cost the defendant to complete the job. The failure to complete was, according to the finding of the trial judge, owing entirely to the defendant's refusal to complete the agreement upon his part. The entire facts were brought out, and no injustice has been done. The defendant did not prove nor claim to have been misled to his prejudice, and he did not seek an adjournment. We do not think that the case is one of variance (see *Baylies Fr. Ev.* 212). The complaint claiming the reasonable value of the work is broad enough to allow a recovery on what is known as the common counts. We know of no immutable rule which required the trial judge to compel the plaintiff to elect the specific ground upon which he claimed a recovery; he was entitled to any relief consistent with his pleadings and proofs. If a party is misled to his prejudice, he should make the fact appear in some way. In the present case, there was no suggestion of surprise, and both parties introduced all their proofs. When a contract has been terminated by the employer against the will of the contractor, the latter may waive the contract and bring his action upon the common counts for work and labor generally (2 *Greenleaf on Ev.* § 104; *Jones v. Judd*, 4 *N. Y.* 411; *Clarke v. Mayor, etc.*, 4 *N. Y.* 339; *Howell v. Gould*, 2 *Abb. Dec.* 418; *Devlin v. Second Avenue R. R. Co.*, 44 *Barb.* 81; *Merrill v. Oswego R. R. Co.*, 16 *Wend.* 586; *Koon v. Greenman*, 7 *Wend.* 123; *Moody v. Smith*, 70 *N. Y.* 598).

In *Chatfield v. Simonson* (92 *N. Y.* at p. 216), the question of election under a defense came up, and the court said: "Under the liberal rule which now prevails for the construction of pleadings, it would be unjust in the extreme to defeat a meritorious defense upon the

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ground here claimed, unless we could see that the party making the claim would be seriously prejudiced thereby. It is quite certain that the plaintiff was as well prepared for the trial as he ever could be," etc. And at p. 217, the court said: "It would even be the duty of the court upon this appeal, under section 723 of the Code, either to disregard the alleged defect in the pleading, or make it conform to the facts proved, if that were necessary to support the judgment." Upon the entire case, we think that no injustice was done, and no error committed which requires a new trial.

Judgment affirmed, with costs.

HYATT, J., concurred.

Affirmed by New York common pleas on further appeal.

City Court.

Trial Term—February, 1885.

JOHN H. CORWIN *against* THE LONG ISLAND RAILROAD COMPANY.

A gateman employed to see that passengers deposit their tickets at the terminus of a railroad and to prevent the exit of passengers who omit to make such deposit, has no constabulary right to pursue and bring back a passenger failing to comply with the regulations after the passenger has been allowed to depart from the depot grounds, nor has the gateman the power to direct a policeman to bring the offender back. Such acts are in excess of the gateman's implied authority, and do not bind the railroad company unless it expressly authorizes them. The gateman, by virtue of his position, is merely authorized to prevent infractions of the regulations and not to punish past transgressions.

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On July 12, 1883, the plaintiff became a passenger on the defendant's cars, on a trip from Bay Ridge to Coney Island. On passing through the gate at Bay Ridge the ticket was punched by the gateman, and while upon the cars it was punched by the conductor. Upon the arrival of the cars at Coney Island the plaintiff could not find his ticket, and was in consequence unable to comply with the regulation of the defendant requiring passengers leaving the cars to deposit their tickets in a box on passing through the gateway leading from the car station. This circumstance led to a conversation between the plaintiff and the gateman concerning the ticket, in which it was suggested to send for the conductor. The conductor came, but said he did not recognize the plaintiff. The plaintiff thereupon started for the gate; the gateman said the plaintiff could not go through, and the latter, according to his own evidence, said: "I thought I would (go through), so I walked on my usual gait and got through and upon the portico of the Manhattan Hotel, and I was walking along there when the gateman with whom I had most of the conversation called to the policeman, saying: 'Arrest that man; stop him, he has got through without depositing a ticket.' . . . Then the policeman called me and said: 'You can't go through here without depositing your ticket. You must come back with me.' I said: 'You better be careful. I know my rights and how to protect myself.' He said: 'You will have to come back with me.' I didn't go back willingly, and he pulled me back and took me through the gateway. Then the gateman shut the gate and said: 'Go in there, and you will stay there until you produce your ticket or buy one.'" Finally the policeman formally arrested the plaintiff, took him before a justice, where an informal examination was had and the plaintiff was discharged.

The plaintiff also testified that there was no restraint or force used against him until after he had got out of the gateway and was upon the piazza of the Manhattan Hotel.

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He said, "I had passed through the piazza of the hotel before any one touched me ; the first person who touched me was the policeman."

This is substantially all the evidence bearing upon the question of law which will presently be considered. The plaintiff has sued the defendant for assault and false imprisonment. Upon the close of the plaintiff's case, developing the above facts, the defendant moved to dismiss the complaint, on the ground that the defendant, not having authorized the wrongs complained of, is not responsible to the plaintiff for them.

H. S. Clark, for plaintiff.

A. C. Chapin, for defendant.

McADAM, Ch. J.—A carrier is undoubtedly responsible for injuries inflicted upon passengers by servants engaged in the performance of duties, within the general scope of their employment, whether the particular act was or was not authorized by the master. The question in such cases is whether the servant was, when he inflicted the injury, acting within the line of his duties, and not whether the particular act was authorized. If, however, the servant goes beyond the range of his employment, and does an act injurious to another, the agent is liable, but the master is not. These rules are elementary. In *Lynch v. Metropolitan E. R. R. Co.* (90 N. Y. 77), it appeared that the defendant had given orders to its gatekeepers not to let passengers pass out until they either paid their fares or deposited their tickets, and the gatekeeper in detaining the plaintiff for non-observance of this rule was, in the language of the court of appeals, "simply doing his duty," and the president of the company confirmed this fact in his testimony. The court held that the regulation was unreasonable, and that the defendant was liable. If the gatekeeper, in the present case, had unreasonably de-

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tained the plaintiff, and had by force prevented him from getting out of the gate and had then and there caused his arrest for not depositing the ticket, the case of *Lynch v. Metropolitan E. R. R. Co.* (*supra*) would have been applicable, the act would have been within the scope of the gatekeeper's authority, and the defendant would have been liable; but the facts of the present case are different. The plaintiff was allowed to pass through the gate and get upon the piazza of the Manhattan Hotel. When he arrived there, he had ceased to be a passenger of the defendant; it was no longer liable for his safety. He had passed from the grounds of the defendant, and it owed him no duty. He was not under the control of the defendant; it had no authority over him. Whatever the servants of the defendant did after this, was not the act of the corporation, but the tortious act of the individual, for which he is alone responsible (See 15 *Am. & Eng. R. R. Cases*, 158).

The liability of a carrier of passengers certainly terminates when the passenger leaves the company's terminus in safety. The defendant had no power to bring the plaintiff to back to its gateway or depot. It never authorized the gateman or policeman to bring him back, and it will not be inferred, in the absence of affirmative proof, that the defendant authorized the gateman to do an act which the defendant itself had no right to perform (*Mali v. Lord*, 39 *N. Y.* 381). In other words, inference will not supply proof of the authority required to hold a corporation liable for acts of the character complained of. The functions of the gateman were to be exercised within the gates of the defendant; he was to see that passengers deposited their tickets before they passed out of the depot. He was not clothed with the constabulary power of pursuing as offenders persons who violated the company's regulations. He was employed to prevent infractions and not to punish past transgressions. There is no proof in the present case that the police officer had any authority

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whatever from the defendant, and as the gateman did not bind the company by his unauthorized act, his direction to the officer cannot operate to bind it. Where, therefore, a station-master arrested a railway passenger, in charge of a horse, for not paying for its transportation, and the railway company could not lawfully arrest a person for such non-payment, but only detain the property, it was held that as the station-master exceeded his authority, the company was not responsible (*Poulton v. Lond. & S. W. R. R. Co.*, 2 *L. R. Q. B.* 534). The theory of the defendant's liability is that the act complained of was done by its direction and command, and so, in reality as well as in law, was its own act through the instrumentality of another. But there is an entire absence of proof that the defendant ever authorized the acts complained of or ratified them afterwards. A corporation should not be made a trespasser against its will. If it had employed the gateman to do the acts complained of, the defendant would undoubtedly have been liable for the manner in which they were performed.

But, as before suggested, the acts complained of were outside of the scope of the gatekeeper's authority, and were not committed in the necessary performance of the limited duties with which he was charged, and there is no legal principal upon which the defendant can be held responsible for them. It follows, therefore, that the complaint must be dismissed.

Affirmed by city court general term.

Perkins v. Harrison.

City Court.

Trial Term—February, 1885.

PERKINS ET AL. *against* HARRISON.

Where a contract of sale is executed, there is no implied warranty as to quality.

If the contract is executory, and the goods are to arrive, a different rule attaches. But even where the goods are to arrive, the warranty implied by the law must be reasonable, and the purchaser must bear the risk of deterioration which is necessarily consequent upon the transmission.

The value of English currency is fixed by statute.

MCADAM, Ch. J.—The plaintiffs declare upon an executed contract of sale. They allege in their complaint “that on or about September 17, 1883, said plaintiffs sold and delivered to the defendant, and said defendant took and received from said plaintiffs certain goods, wares and merchandise—to wit, 104 tons 693 pounds East Ince Hall Cannel coal which, at the price per ton then and there agreed upon therefor of 32 shillings English money, amounted in the currency of the United States to \$814.29. The defendant admits that he purchased and received the coal, but denies the value, in the United States, of the English currency. The value of the English currency is fixed by statute (*U. S. Rev. Stat.* § 3565) which sustains the plaintiffs’ computation. Thus the plaintiffs’ case is completely made out.

The defendant, for defense, relied upon the allegation “that at the time of the sale it was represented and agreed by the plaintiffs that the coal should be perfect and marketable, whereas a portion was unmarketable and crushed and of no value.” The defendant also alleges

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that the sale was made without an opportunity to examine the coal. The defendant failed to prove that the plaintiffs made any representation whatever concerning the coal, except that it was "East Ince Hall Cannel coal." The representation made was true, and the defendant is therefore left to an implied warranty as to the condition of the coal. The difficulty the defendant has to contend with is that it does not appear that the contract was executory, nor that the coal was bought to arrive.

On the contrary, the contract declared on and admitted by the pleadings is an executed sale, on which no implied warranty attaches (*Hart v. Wright*, 17 *Wend.* 267; 18 *Id.* 449); for, in the language of Judge PAIGE, in *Hargous v. Stone* (5 *N. Y.* 86), "If the article is at the time of the sale in existence and defined and is specifically sold, and the title passes *in presenti* to the vendee, the transaction amounts to an executed sale, and although there is no opportunity for inspection, there will be no implied warranty that the article is merchantable." But even on a sale of goods "to arrive," the warranty implied by the law must be reasonable, and the purchaser must bear the risk of deterioration which is necessarily consequent upon the transmission (*Bull v. Robinson*, 10 *Exch.* 342-346). The coal was of the brand indicated (*Dounce v. Dow*, 64 *N. Y.* 411), and the defendant did not elect to reject, but accepted it (*Townsend v. Shepard*, 64 *Barb.* 39). So that whatever remedy he might otherwise have had, it is clear from the pleadings and proof that there is no defense.

The plaintiffs are entitled to judgment.

Mayo v. Austin.

City Court.

Trial Term—February, 1885.

MAYO against AUSTIN ET AL.

A guardian may sue in his own name for a debt due to his ward, an administrator may sue in his own name for a debt due to the estate he represents, and a person appointed committee of a lunatic may sue in his own name on a promissory note given to him as such committee, and in neither case need the official designation of the party plaintiff be added to his name. The plaintiff in each of these cases is the trustee of an express trust and may sue in his individual name.

MCADAM, Ch. J.—The plaintiff sues for goods sold and delivered to the defendants. The answer is a general denial. Upon the trial, the plaintiff testified that the property belonged to her son, and that in selling it she acted for him as guardian. The defendant moved to dismiss the complaint on the ground that, as the plaintiff had brought the action in her own name, and had not sued as guardian, the action was not maintainable.

The plaintiff, having actual possession of the property at the time of the sale, was not bound to prove her title (*Fitzpatrick v. Caplin*, 4 *E. D. Smith*, 165). But having volunteered the admission that the property belonged to her son, it seemed to me that she could not at pleasure convert an asset belonging to her ward into a judgment representing a debt due in her individual right and title, as this would on first impression seem to be adverse to the ward whose interests she was bound to protect. The complaint was, therefore, dismissed.

After examining the question, I have come to the conclusion that this was error. The following cases furnish the reasons: In *Davis v. Carpenter* (12 *How. Pr.* 21) it

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was held that the committee of the person and estate of an habitual drunkard may maintain in his own name actions on promissory notes he received as such committee, and that it was not even necessary for the plaintiff to describe himself as "committee, &c."

In *Thomas v. Bennet* (56 *Barb.* 197) it was held that a general guardian appointed by the surrogate may maintain an action in his own name, as such guardian, to recover a debt due to the ward.

In *Nichols v. Smith* (1 *Hun*, 580) it was held that an action can be sustained by a plaintiff in his own name upon a foreign judgment recovered by him as administrator. The court proceeded upon the ground that "the debt sued for is in truth due to the plaintiff in his personal capacity, for he makes himself accountable for it by bringing his action, and he may well declare that the debt is due to himself."

In *Merritt v. Seaman* (6 *N. Y.* 168) it was held that an executor may at his option maintain an action in his own name or his representative capacity, upon a note given to him as executor for a debt due to the testator at the time of his decease.

The same principle was decided in 14 *Mass.* 327; 44 *Ala.* 629; 15 *Wisc.* 415; 6 *Barb.* 230; 47 *Id.* 523; 59 *How. Pr.* 24; 14 *Hun*, 593, and 5 *Sandf.* 433. The contract was made by the plaintiff for the benefit of another, and she is the trustee of an express trust within the meaning of section 449 of the Code.

The action was properly brought, and the motion for a new trial must be granted; no costs (see 65 *How. Pr.* 508).

Clarke v. Anderson.

City Court.

General Term—February, 1885.

ABRAHAM H. CLARKE ET AL., PLAINTIFFS AND RESPONDENTS, *against* JOHN R. ANDERSON ET AL.,
DEFENDANTS AND APPELLANTS.

The plaintiffs occupied the sub-cellar of premises No. 63 Reade street. The Dixon Crucible Co., who were landlords of the plaintiffs, occupied the basement and first floors of said premises. The defendants and two tenants of theirs occupied the second floor. There was a stop-cock in the basement occupied by the Crucible Co., which, when shut off, effectually prevented the Croton water from entering the building. The Crucible Co. were in the habit of shutting off this stop-cock on closing their business for the day. On the Saturday before the overflow occurred, the Crucible Co. failed to perform this duty, and the water ascended to the second story, occupied by the defendants, and in consequence overflowed. There was a stop-cock on the floor occupied by the defendants, who, not being apprised of any danger, never shut it off, relying upon the custom of the Crucible Co. of shutting the water off in the basement. If the stop-cock on the defendants' floor had been shut off, the overflow would not have occurred. *Held*, that these facts did not *per se* prove negligence on the part of the defendants, and they were not liable for the overflow. The reasons stated.

The action was to recover damages for injuries done to certain goods in which the plaintiffs had a special property. The damage was caused by an overflow of water said to have been caused by the negligence of the defendants.

The facts are substantially these: The plaintiffs occupied the sub-cellar of the building No. 68 Reade street, in the City of New York, for the storage of merino and woolen undershirts and drawers which were consigned

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to them for sale on commission, and on which they had made advances. The basement and ground floor were occupied by the Dixon Crucible Co., who were the plaintiffs' lessors. The defendants, with two of their tenants (Mr. Hill and Dabney & Co.), occupied the second floor directly over the store occupied by the Crucible Co.

There were water fixtures on the floor occupied by the defendants, used by them and their two tenants, consisting of a tank over the water-closet, supplying water to the closet and wash-basin and urinal, and there was a pump used for filling the tank, and a pipe, coming up from below, supplying water through the pump to the tank. There was an overflow pipe, commonly called a waste-pipe, both for use in the water-closet basin and to provide against overflow of the tank in pumping. The fixtures were so arranged that the overflow, in case the tank became full, should run through the pipe into the closet and so off into the waste-water pipe, carrying it into the main street sewer, and the tell-tale pipe was to indicate to the pumper that the tank was full. It was not to carry off the overflow. There was a stop-cock, eighteen or twenty inches above the floor, which intercepts the water before it gets to the pump and which regulates and controls the delivery of water to the second floor.

The entire supply of water to the building was controlled by a stop-cock in the basement occupied by the Crucible Co., which, when turned off, prevented the water from entering any part of the building. It was the custom of this company or its employees every night, at about six o'clock, to shut the water off from the building, so that no water could be obtained on defendants' floor after that hour, and this custom was known to and relied upon by the defendants. There is evidence that on the Saturday evening preceding the injury the employees of the Crucible Co. shut off the water from the building at the close of the business day, about ten minutes before six o'clock, and it does not appear that it

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was turned on again before Monday morning, May 21, 1883.

On this same evening, Dabney & Co. (defendants' tenants), remained on the second floor (where the overflow occurred), after the defendants and their employees had left for the day.

The water arose on Sunday, the 20th of May, 1883, up to the second floor of said premises, filled the tank and overflowed, the waste-pipe, for some reason or other (not clearly established), proving inadequate to carry off the supply.

This overflow damaged the plaintiffs' property to the amount of \$1,318.90, for which sum, with interest, the trial judge ordered judgment in favor of the plaintiffs, on the ground of negligence on the part of the defendants, and from this judgment the defendants appeal.

John H. Parsons, for appellants.

W. P. Richardson, for respondents.

MCADAM, Ch. J. - The defendants are not liable for the injury complained of, unless it was caused by their negligence, or in other words, unless the evidence proves that the defendants neglected some duty owing to the plaintiffs, or failed to exercise that care, in the management of the water apparatus on their floor, which an ordinarily prudent man would have observed under like circumstances.

The charge of negligence against the defendants seems to be founded on their omission to turn off the stop-cock on their floor, on the evening preceding the overflow, but this omission, in view of the facts, is not *per se* evidence of negligence. It had never been turned off before by the defendants, nor does it appear that they had any reason to know or believe that unless turned off an overflow was likely to follow. It was with difficulty that the water

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required was obtained on the second floor ; it had to be pumped up, and the possibility of overflow was guarded against by the waste pipe which was naturally supposed to be sufficient to carry away all waste water and make an overflow impossible. The defendants did not introduce the water upon their floor, nor did they make any alterations in the pipes. They found the fixtures there when they moved in, and they left them as they were, and, as tenants had the right to assume that the pipes and overflow were properly arranged, and were sufficient for the purposes for which they were intended. The defendants are not liable for their defective construction or insufficiency, and negligence in their use as a ground of liability was not established. That the overflow occurred on the defendants' floor is clearly established, but how or from what particular cause is not so readily determined. It may have been caused by the insufficiency or temporary stoppage of the waste-pipe, and the unexpected failure of the Crucible Co., on this occasion, to observe their custom of shutting off the water in the basement. There is proof that the Crucible Co. (the occupant of the basement) shut off the water from the building the night before the overflow, and that it remained shut off until Monday morning ; but this is hardly possible, as the overflow could not have occurred in the meantime, if the company had on this occasion observed this its customary habit. We must assume, therefore, either that the Crucible Company failed on this occasion to observe its usual custom (on which the defendants had previously relied with safety) or that, if it shut off the water, some evil disposed person must have turned it on, and, in consequence, the water, on the following day (Sunday), owing to its great pressure—the factories and large establishments using it during the week being then closed—found its way up to the defendants' floor, ran in the tank and from thence to the waste-pipe, which, being insufficient to carry the water away, overflowed and did the damage. The

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defendants had never been apprised of any threatened danger from this source, and had not been warned to turn off the stop-cock on their floor, and had up to this time never found it necessary to do so.

We cannot hold that the defendants were, under such circumstances, guilty of negligence, or that they failed to do that which an ordinarily prudent man would have done under like circumstances. The average business man would, we think, have acted as the defendants did, and would have assumed, in the absence of notice to the contrary, that there was no reconдите danger. If the defendants on this particular occasion had acted differently from what they had on prior occasions, and had omitted any precaution which they previously been in the habit of observing, and damage had occurred in consequence of the omission, negligence might have been imputed to them ; but to infer negligence on their part in this case is to hold in effect that a tenant, moving into a loft or tenement where there are water fixtures, is liable for any overflow which may happen during the night, even though it happened without his agency. This would practically make the occupants of a tenement insurers to each other for the sufficiency of the water-pipes in their respective portions of the premises. It would require the tenant on each floor to shut off the water on leaving or retiring for the night, to the possible discomfort of the tenants occupying floors above, who might require its use. The law does not go so far. It is satisfied by holding the occupant of each floor liable only for his own acts of omission and commission, and if negligence cannot be established against the particular occupant sued, the party injured is, like any other plaintiff who fails to make out a cause of action, without remedy against the party he has called upon to respond. There is evidence that the stop-cock on the defendants' floor was intended to stop the water, while the pump, &c., over the closet were undergoing repairs. This is undoubtedly true, but it would have done more ; it

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would, if turned off, have prevented the overflow which happened; and if the defendants had been notified that it was necessary to turn the stop-cock on leaving for the day, it might have been negligence on their part if they had failed to do so. But no such notice was given.

In *Ross v. Fedden* (7 *Law R. Q. B.* 661) it appeared that the plaintiff occupied, for business purposes, the ground floor and the defendants the second floor of the same house, respectively, as tenants from year to year. There was a water-closet on the defendants' premises to which they alone had access. After their respective premises had been closed on a Saturday evening, water percolated from the water-closet, through the first floor, to the plaintiff's premises and caused damage to his stock in trade. The overflow of the water was owing to the valve of the supply-pipe to the pan having got out of order and failing to close, and the waste-pipe being closed with paper. The defects could not be detected without examination. The court held that, as the defendants did not know of these defects, they were not guilty of negligence and were not liable.

In the case cited, the court said: "Up to Saturday evening there was no reason to suspect that the valve had given way, or was in any danger of giving way, or that anything was wrong with the closet, and I see no negligence in not guarding against a danger which there is no reason to anticipate." In the same case Judge BLACKBURN said: "If the defendants had got notice of the state of the valve and pipe, and had done nothing, there might have been ground for the argument that they were liable for the consequences." In this case, as in that, there was no proof that the defendants had any notice of the danger which subsequently developed itself. Another difficulty in the present case is the circumstance before adverted to, that there were two other occupants of the second floor, viz.: Mr. Hill and the firm of Dabney & Co.

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(tenants of said defendants). The water apparatus was used in common by these persons, and Dabney & Co. were on the premises on the Saturday preceding the injury, after the defendants had left for the night.

The defendants were not liable for the negligence of their sub-tenants. They had keys, and went in and out independently of the defendants. It was incumbent, therefore, on the plaintiffs to show affirmatively whose act caused the damage, for, in the language of the court of appeals in *Harris v. Perry* (89 N. Y. 308), "It will not be presumed or guessed. Neither can be held liable for the negligence of the other. There can be no presumption of negligence against either occupant."

If inference, however, is to take the place of proof, it would be just as fair to impute negligence to Dabney & Co., who were on the premises last, as to the defendants, who, with their employees, left for the evening before Dabney & Co. had concluded their labors for the day.

In *Moore v. Goelet* (7 Bosw. 531; *aff'd*, 34 N. Y. 527) the court said: "Indeed, if it had appeared that the defendants had exclusive occupation of another part—as might be true of two tenants of a common landlord—but each had a right to use a water-closet and faucet and each had an equal control over the management and care thereof, we are of opinion that if either be sued for damages sustained by another from some carelessness in the use of fixtures, the plaintiff must prove the neglect to be the defendants'. He cannot rest with merely showing his injury and that it was caused by a flow in the night season from a faucet carelessly left open, without showing that it was left by the carelessness of the defendant or his employees. Where two or more have the use of such fixtures in common, under a right to use or occupation held by them jointly, so that the use and the control of the premises is joint, the responsibility for the proper use and care of the fixtures may be joint; so that the liability attaches *prima facie* to each on proof that negligence has

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occurred and damage has ensued. But where the right is several, I apprehend that each is responsible only on proof of negligence on his own part, and neither is responsible for that of the other."

Upon the entire case, therefore, we are of opinion that the plaintiffs failed to make out a cause of action, and that the judgement rendered in their favor must be reversed and a new trial ordered, with costs to the appellants to abide the event.

HYATT and HALL, JJ., concur.

City Court.

Trial Term—February, 1885.

ROBERT HENRY GILDEA *against* FERDINAND P. EARLE.

A hotel-keeper who sells goods of his guest to satisfy a board bill is guilty of conversion, unless he is authorized by the guest to sell, or unless he forecloses his lien in the mode pointed out by the statutes.

Wm. Irvin, for plaintiff.

Jones Cochrane, for defendant.

The plaintiff, a guest of the defendant, left his hotel, leaving his wardrobe and a board bill due. The defendant subsequently sold the property to satisfy his lien, and the plaintiff sued for conversion. The facts appear in the charge to the jury made by:

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"MCADAM, Ch. J.—Gentlemen : The plaintiff became a guest of the defendant's hotel, and contracted a bill amounting to \$37.95, which being unpaid, his baggage, which was in the hotel, was retained as security for the payment. The defendant, being a hotel-keeper, had an inn-keeper's lien upon the plaintiff's baggage, and, therefore, had a legal right to retain it until the charges thereon were paid. No wrong was done up to this time, and neither party had a legal cause of complaint against the other, so far as the present record discloses. It is claimed, however, that subsequently the defendant wrongfully sold the plaintiff's property and thereby converted it to his own use, to the plaintiff's damage. The defendant denies the alleged conversion. This is the issue presented, and is the main question you are called upon to decide. The defendant admits that he sold part of the defendant's property, and says he is willing to return that which remains unsold. The defendant justifies the sale on two grounds : *First*. Upon express authority from the plaintiff; and, *Second*. Upon his statutory right as an inn-keeper. Upon these questions I charge you :

"*First*. If the plaintiff authorized the sale of these goods, it was a legal sale, whether conducted by an auctioneer or otherwise, because the defendant by such authorization became the plaintiff's agent for all the purposes of the sale. Therefore, if you find the plaintiff authorized the sale, find for the defendant.

"*Second*. If the plaintiff gave no express authority to the defendant to sell, still the defendant had the statutory right to sell, provided he published notice of the time and place of sale, according to the act of 1879 (chap. 530). There is no proof, however, that the provisions of this act have been complied with, so that the authority to sell, not being derived from compliance with the statute, nor from the judgment or decree of any court, must have come from the plaintiff, or otherwise it was unauthorized and amounts in law to a conversion. An inn-keeper may, if

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he chooses, avail himself of this statute, which is permissive merely, or he may foreclose his lien in equity, or by proceeding under other statutes which authorize the foreclosure of such liens and sales therefor, but there must be authority in some legal form for the sale.

"If the sale was legal, it will be your duty to find a verdict for the defendant in respect to the goods sold, and also as to the balance, unless you find affirmatively that he had possession of them and refused to give them up on demand. The question of tender becomes of very little consequence, because it was made after the sale and after the defendant's demand had been satisfied—and after the defendant had put it out of his power to comply with the demand.

"If, on the other hand, you find that the sale was unauthorized and illegal under the instructions I have given, you will find a verdict in favor for the plaintiff for the fair and reasonable value of the property at the time of the conversion, considering, of course, in determining the question of value, the character, age and condition of the property said to have been converted, and deduct from this value the amount of the defendant's lien on the property and render your verdict for the balance, with interest added. If the goods on the sale brought all they were worth, and the sale embraced all the goods the plaintiff left at the hotel, find for the defendant, as they only brought about enough to satisfy the lien and other charges."

The jury found in favor of the plaintiff for \$205.

This judgment was affirmed by the general terms of the city court and New York common pleas.

Seventh Ward National Bank v. Newbold.

City Court.

Trial Term—March, 1885.

SEVENTH WARD NATIONAL BANK *against*
NEWBOLD ET AL.

Notes given on gambling transactions are declared void by statute, but if they are transferred to an innocent holder, and while in his hands the note is renewed, the taint of illegality is removed, and the innocent holder may recover on the renewed note, although he could not have recovered on the original note.

McADAM, Ch. J.—Notes given on gambling transactions are like negotiable instruments given in violation of the statute against usury—both are declared void by statute, and the same principles and qualifications are equally applicable to both (*Edwards on Bills*, ed. of 1857, p: 368). The original note herein was made by the defendant Newbold, and was given by him to the defendant Coffin, who had it discounted at the lawful rate of interest by the plaintiff, before maturity. The defendants, at its maturity, renewed the original note. It was then held by the plaintiff as an innocent holder for value, without notice of any infirmity in it or defense to it. The rule undoubtedly is that if the original note is void, all new contracts growing out of it are alike void (*Mabee v. Crozier*, 22 *Hun*, 264; *Treadwell v. Archer*, 76 *N. Y.* 196).

But this rule, like many others, has its exceptions. The rule does not apply to the present case, which comes within the well established exception that where an usurious instrument comes into the hands of an innocent holder who, not knowing of the usury, accepts a new security in renewal, the latter is valid (*Cuthbert v. Haley*, 8 *T. R.* 390; *Powell v. Waters*, 8 *Cow.* 681; *Kent v. Wal-*

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ton, 7 *Wend.* 256; *Brinkerhoff v. Foot*, 1 *Hoff. Ch.* 291; *Dix v. Van Wyck*, 2 *Hill*, 522; *Smedberg v. Simpson*, 2 *Sandf.* 85; *Smalley v. Doughty*, 6 *Bosw.* 66, 74; *Kilner v. O'Brien*, 14 *Hun*, 414; *Bradley v. Manning*, 12 *Weekly Dig.* 497). The defendant had his *locus pœnitentiæ* when the first note matured. He had it in his power then to plead the statute and defeat a recovery even by an innocent holder. The defendant thought better of it, and did not choose to exercise that arbitrary right, but voluntarily gave the plaintiff the note in suit upon receiving back from it the contaminated note canceled.

If the substituted security had been given to the party to the original contract, it would, like that, have been void in its inception; but the original security had passed into the hands of the plaintiff. It was ignorant of the illegal character of the original transaction, and the renewal of the first note purged it of its infirmities. In other words, the note in the hands of the plaintiff, a *bona fide* holder, innocent of any violation of the law, was capable of ratification by the wrongdoer, and when the note which represented the illegal transaction between the original parties was returned to the defendant and canceled, it was competent for him to make a new contract with the innocent holder to pay to it the loss which it would otherwise have sustained by means of the defendant's indiscretion and wrong. There is nothing in this which offends the statute, public policy or good morals, for the new contract is consistent with that principle of justice which is embodied in the maxim that "where one of two innocent persons must suffer from the fraud of a third, such loss shall fall upon the one whose act has enabled the fraud to be committed." The defendant recognized this legal rule of moral ethics when he gave the renewed note, but declines to follow it when called upon to give it practical effect. It is too late to repudiate now. The law favors innocent parties and denies redress only to those *in pari delicto*.

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The verdict in favor of the plaintiff was properly directed, and the motion for a new trial must be denied.

Destroying Old and Making New Contract.

If the usurious contract be mutually abandoned by the parties, and the securities be canceled or destroyed, so that they can never be made the foundation of an action, and the borrower subsequently makes a contract to pay the amount actually received by him, this last contract will not be tainted by the original usury, and can be enforced (*Sheldon v. Haxtun*, 91 *N. Y.* 132, per EARL, J., citing *Hammond v. Hopping*, 13 *Wend.* 505; *Kilbourn v. Bradley*, 3 *Day*, 356; *Houser v. Planter's Bank*, 57 *Ga.* 95; *Bank of Monroe v. Strong*, *Clark Ch.* 76. See also *Goulding v. Davidson*, 26 *N. Y.* 609; *Miller v. Hull*, 4 *Denio*, 107; *Jacobson v. Bradley*, *Daily Reg.* February 12, 1887).

City Court.

Trial Term—March, 1885.

ALBERT S. WASHBURN against WILLIAM E. RIDER.

Defendant applied to plaintiff for a loan of \$1,000. Plaintiff had the money on deposit in a savings bank, and told the defendant that if he withdrew it, he would lose \$13, accrued interest thereon, which he could not collect from the bank. The defendant agreed to pay the \$13 and legal interest for the use of the money. *Held*, that the transaction was not usurious, and that a further agreement, made in good faith, to take the lender into the defendant's employ did not render the loan *per se* usurious.

Action on a promissory note. Defense, usury. The facts appear in the direction to the jury to find for the plaintiff.

Washburn v. Rider.

M. A. Kellogg, for plaintiff.

I. T. Williams, for defendant.

MCADAM, Ch. J., in directing a verdict for the plaintiff, said: "There is no usury in this case. The contract required the defendant to pay for the loan and forbearance of the money six per cent., which is lawful interest. There is nothing thus far which imports into the case any illegal element. The two circumstances claimed to make the loan unlawful were—first, the taking of the interest which the plaintiff lost at the bank. The plaintiff, according to his testimony, told the defendant the money was in bank, that if he withdrew it, there would be a loss on \$1,000 of \$13 and some cents, and if he took the loan, he would have to make that loss good. The defendant, in allowing the \$13 and some odd cents, merely made that loss good. It was not interest on the loan which the plaintiff received, but money taken to make good a loss actually incurred at the bank for the defendant's benefit. In other words, the \$1,000 in the bank had earned \$13 and some cents of interest. The plaintiff, therefore, practically had \$1013 and some cents in the bank to his credit; but by drawing it out then, the bank, according to its rules, would not pay the \$13 and some cents. He says to the defendant, "If I draw the money from the bank you must make good this loss." It is like a man who has money in Philadelphia, and another wants to borrow it, and he says, "If I go to Philadelphia, it will cost me \$5 for my car-fare and lunch. If you will pay the expense I am put to and give me lawful interest, I will go and get the money." An expense of \$5 actually incurred under such circumstances would not make the loan usurious.

"The statute in regard to usury makes it a criminal offense for a party to exact it. I feel sure that a man taking his actual expenses to Philadelphia and back, and getting only lawful interest for his money could not be indicted and sent to jail as a criminal.

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"In *Tillinghast vs. Pratt* (N. Y. Supreme Court, 18 N. Y. *Week Dig.* 570) it appeared that the plaintiff agreed to loan his money to one P., who employed him at a fixed salary to attend to his office business, keep books and solicit business, and it was held that the agreement was not *per se* usurious, but depended on the intention of the parties, and that the fact that the plaintiff did not do as much work as was expected threw very little light on such intention. There is no rule of law which forbids an employer to borrow from his employee or prevent the employee from lending to his master. In the case on trial it is not alleged in the answer, nor has it been proved on the trial, that the idea of employment was a pretense, cover or disguise by which usury was to be exacted. Services were to be performed. How valuable they were, or how little they were worth, under the case cited, is of little consequence, so long as the services were in good faith rendered.

"The defendant's check-book shows that the check of \$13 and some cents was given to the plaintiff to repay the savings bank interest. It is so expressed on the stub of the check-book. The checks that were given for services indicate on the stubs that they were given for services. So that, under all these circumstances, it seems to me that there is nothing on which the jury could find a corrupt intent on the part of the plaintiff, or an intention to exact more than the legal rate of interest; nor is there any evidence from which the jury could infer that the transaction was colorable or a pretense to exact unlawful interest.

"It may have been, and no doubt was, inconvenient to the defendant to break in upon him and demand the money at a time when it was not convenient for him to pay—but there is an old proverb that holds good in this case, and probably every other, and that is, 'the borrower is slave to the lender.' If you, gentlemen, have ever borrowed money you probably have had that experience.

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If you have not, everybody else that has borrowed, has had it; and it is one of the evils of getting into debt. The day of reckoning will come, and it may come at a very unfortunate hour. It may blot a man out of business existence. Unfortunately, that is one of the vicissitudes of life, and there is no way of getting around it or over it. Whether the plaintiff was as lenient as he ought to have been to the defendant is a matter that we have nothing to do with. The only question for us is, whether there was usury, such as the law forbids, and as a punishment for which the law absolutely annuls every security taken, and and debars a party from recovering back even the money he lent. It is a highly penal statute, to be enforced only in cases clearly brought within its provisions. If you loan a man a thousand dollars, and deliberately take one dollar more than lawful interest, the thousand dollars is gone, and you are remediless. You have violated the law and cannot ask its aid. It is your misfortune, and no court of justice can help you. I hardly think this is such a case.

“The motion for a direction will therefore be granted.”

The jury, by direction of the court, thereupon rendered a verdict in favor of the plaintiff for the amount claimed, with interest.

A motion for a new trial was made, and denied on the authorities cited above, and *Thurston v. Cornell*, 38 N. Y. 285; *Harger v. McCullough*, 2 *Demo*, 119; *Morton v. Thurber*, 85 N. Y. 550; *Lynde v. Staats*, 1 N. Y. *Leg. Obs.* 89; *Eaton v. Alger*, 2 *Abb. Civ. App. Dec.* 5. The judgment was affirmed on appeal.

Pepper v. Kisch.

City Court.

Trial Term—March, 1885.

GEORGE F. PEPPER *against* **DAVID KISCH ET AL.**

A salesman employed "to travel through the southern part of the United States," and to follow the instructions of the persons "thus employing him," cannot be required against his will to travel through other territory, and refusal so to do does not authorize his discharge.

Jus. Dunne, for plaintiff.

S. Wolf and *H. Townley*, for defendant.

MCADAM, Ch. J.—The language of the contract is that George F. Pepper "has to travel through the southern part of the United States, and will have to follow the instructions of the parties thus employing him." The words, "has to travel through the southern part of the United States," exclude the implication that he is to travel anywhere else. The instructions the plaintiff was to follow applied to a person thus employed,—that is, to a person employed to travel in the Southern States and Territories. A person employed to sell goods in the South can not be compelled against his will to sell goods during the winter cold in Canada. He might not be known there, nor might he be able to endure the climate. It is only breaches of an express or implied condition of the contract that justify either party in putting an end to it. The words "and will have to obey the instructions of the parties thus employing him," on which the defendants rely, meant that while on his southern trip he was to be under his employer's instructions. The law would have implied as much if this expression had not been used, and it

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carries with it no greater force than the law would have applied to the contract.

The case went the jury on the question of performance of services in the Southern States and willingness to continue such performance, and the jury found in favor of the plaintiff for \$1,384.38.

The judgment entered on this verdict was affirmed on appeal by the general term of the city court and common pleas.

City Court.

Trial Term—March, 1884.

JOHN D. W. JOY ET AL. *against* NATHAN J.
SCHLOSS ET AL.

Contracts for the delivery of goods to be manufactured are contracts for the sale of merchandise within the statute of frauds, unless the goods are to be manufactured by the vendors themselves.

Decision on motion for judgment on special verdict.

E. H. Pomeroy, for plaintiff.

S. Wolf, for defendant.

McADAM, Ch. J.—David Smith, a clerk of the plaintiffs, took samples and went around among the clothing trade soliciting orders. He called upon the defendants and obtained an order for two styles of cloths, known in the trade as Salisbury suitings. The quantity and price were agreed upon, and the goods were to be delivered in May,

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1883. The price exceeded \$50; no note or memorandum of the contract was subscribed by the defendants, and no part of the goods were accepted by the defendants.

Two sample pieces of about thirty-five yards were delivered to the defendants in April, and were returned to the plaintiffs four or five days afterwards, accompanied by a letter in these words.

"NEW YORK, April 9, 1883.

"MESSRS. JOY, LANGDON & CO,
110 Worth st.

Gent. We bought of you Salisbury suitings, to be *all* wool, styles 712 and 718. We found on boiling same the result as per sample enclosed. We cancel same.

"We remain,
Yours resp.,
N. J. SCHLOSS & Co."

Shortly after taking the order from the defendants, Smith, the plaintiffs' agent, made a memorandum in these words:

"NEW YORK, Feby. 12, 1883.

"MEMO. of order given by N. J. Schloss & Co.

Salisbury Suitings.

712 } 750 yds ea. .
718 } \$200

Trade 5%

5 | 60—60 extra.

Samples pcs. 1st Apl. Balance in May.

"JOY, LANGDON & CO.

SMITH."

A copy of this memorandum was sent to the defendants a few days afterwards with small samples about three inches square.

Treating the transaction as a sale, it has no binding validity in law (*Story on Sales*, § 266; *Benjamin on Sales*,

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§ 255; *Justice v. Lang*, 42 N. Y. 493). The memorandum is not a bought-and-sold note, nor was Smith the broker or agent of both parties, nor was any memorandum signed by Smith on behalf of the defendants and delivered to the plaintiffs.

But the plaintiffs claim that a written recognition of a contract, void by the Statute of Frauds, though after it was entered into, will make it binding, and they cite *Gade v. Nixon*, 6 Cow. 445; *Thompson v. Menck*, 4 Abb. Ct. App. Dec. 400; *Kuhn v. Brown*, 1 Hun, 249, to sustain this principle. The language used in the defendants' letter of April 9, in which they write to the plaintiffs: "We bought of you Salisbury suitings," etc., is said to make these cases applicable. But that letter says the suitings purchased were "all wool," and the contract was canceled or repudiated because the samples sent on after a test disclosed that the suitings which the plaintiffs furnished contained a mixture of cotton, although the percentage of cotton is disputed, some of the witnesses placing it from 25 to 40 per cent., so that the contract sued upon is not that which is recognized by the letter just referred to.

In *Gale v. Nixon* (6 Cow. 445), the vendors of land executed a contract of sale, but the vendees did not. The vendors, by an indorsement on the back of the contract, recognized its validity, and this was held sufficient to bind them, because they assented to the very terms and conditions to which the vendors had previously subscribed.

The letter held to be a valid recognition in *Thompson v. Menck* (4 Abb. Ct. App. Dec. 400), referred to the purchase by the vendee, and requested the vendors to make a delivery of the goods on his account to a Mr. Warner, and the goods were subsequently delivered as requested.

Kuhn v. Brown (1 Hun, 249) affirmed the rule declared in *Gale v. Nixon*, *supra*, that "It is not necessary that the identical agreement should be signed, but if it is acknow-

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ledged by any other instrument, duly signed, it is sufficient."

In the present instance, the letter of the defendants does not acknowledge the existence of any such contract as that claimed to have been made by the plaintiffs. The defendants substantially say that they bought suitings "all wool," you claim a sale of different goods, hence "we cancel" the contract. This is not a recognition but a denial of the contract on which the plaintiffs base their right of recovery. This does not prove a meeting of minds, but a misunderstanding, which is not a contract. The plaintiffs then claim that the transaction does not come within the statute, because it was not a contract of sale, but of manufacture. That the goods were not in existence at the time the order was given (*Passaic Manuf. Co. v. Hoffman*, 3 *Daly*, 495).

There can be no doubt that a contract to manufacture a thing which never would have been manufactured in the particular manner or shape that it was, is essentially a contract for special skill, labor and workmanship, and within the statute (*Meincke v. Falk*, 15 *Reporter*, 95). Yet where the seller is not the manufacturer, the contract is one for the sale of goods, wares and merchandise within the statute (*Millar v. Fitzgibbons*, 9 *Daly*, 505). In an action against the vendor the vendee must show that the vendor is the manufacturer (*Ib.*). If the action is by the vendor against the vendee, the vendor should by a parity of reasoning show that he is the manufacturer, so as to take the case out of the operation of the statute, by making it a contract for work, labor and services.

The evidence shows that the goods tendered to the defendants were manufactured by the Essex Mills, a corporation created under the laws of the State of Massachusetts; that the plaintiffs are the agents of that and other mills. But the present action is not brought by or on behalf of the Essex Mills, nor does the evidence show that the action is prosecuted for the benefit of the Essex

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Mills, or that that corporation is to realize any benefit or suffer any loss from any judgment which may be rendered herein.

The plaintiffs should have connected the mill as the manufacturer in some pecuniary way with the order which the defendants gave, so as to avoid the effect of the decision in *Millar v. Fitzgibbons* (*supra*). If the mill had claimed the benefit of the contract and brought the action, a different question would have been presented from that which arises upon the present record.

The plaintiffs cannot be regarded as the mill for the purposes of this action.

The evidence demonstrates that they have some interest in the contract they seek to enforce, which is greater than that possessed by the mill, the mill probably agreeing to manufacture at one price and the plaintiffs agreeing to sell at another, the difference being their profit. This does not clearly appear by the evidence, but is a fair inference to be drawn from it.

The difficulty is that the plaintiffs ought to have made the relations existing between them and the mill more clearly appear, so that, if possible, the contract declared on might have been enforced without offending well settled rules of law.

The jury made a special finding to the effect that no material misrepresentations were made to induce the order, but this finding does not cure the legal infirmity in the inception of the contract,—i. e., the want of a writing subscribed by the defendants. This finding does not even aid the so-called letter of recognition, because the writing or recognition must, in itself, unaided by extrinsic evidence, contain all the elements of a valid contract (*Story on Sales*, § 269).

Upon the entire case, there must be judgment on the special verdict, for the defendants.

This decision was reversed by the general term (Opinion by

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HAWES, J.), and was reinstated by the following opinion, *which reverses the general term.*

VAN HONSEN, J.—The learned justice who wrote the opinion of the general term of the city court of New York, said very correctly that, if as matter of fact, the plaintiffs had failed to show that the goods were to be manufactured by them, the statute would clearly apply to the contract, and the mistake that the general term made was in assuming that the plaintiffs themselves were bound by the contract to manufacture the goods. There is not only no evidence to support such a finding, but there is conclusive evidence to the contrary.

The plaintiffs were agents for several mills that manufactured woollen and cotton goods, the Essex Mills and the Hamilton Mills being among the number. As a dry goods commission house, the plaintiffs sell goods for manufacturers and take orders for them. In February, 1883, they got from the defendants an order for two pieces of Salisbury suitings which they agreed to deliver in the following April and May. Nothing was said as to the place where, or the parties by whom the goods should be made, though it was understood that they were not in existence. Any goods that corresponded to the sample, whether manufactured by a mill that the plaintiff represented or not, could lawfully have been delivered in fulfillment of the order.

There is not a word in the testimony that gives the faintest color to the assertion that the defendants expected that the plaintiffs themselves would manufacture the goods; but yet, because it appeared in the course of the trial that the plaintiffs were stockholders of a corporation called the Essex Mills and its sole agents, the general term of the city court came to the conclusion that the contract required the plaintiffs themselves to manufacture the goods. Having reached that entirely unwarranted conclusion, the general term then decides, in opposition to all the evidence, that the plaintiffs did actually manufacture the goods.

It is easy to imagine circumstances under which such a decision would operate most severely and unjustly upon the plaintiffs, for it is familiar law that a manufacturer is held liable upon an implied warranty against latent defects, though no such liability attaches to an ordinary commission merchant (*Hoe v. Sanborn*, 21 N. Y., 552).

It is perfectly clear that the general term fell into error in assuming that the plaintiffs owning some shares of stock of the corporation called the Essex Mills had a bearing on the question of the applicability of the Statute of Frauds to the contract of the parties. It was proved that the plaintiffs gave the order for the Salisbury

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suitings to the Essex Mills, but the contract with the defendants did not require them to do so. As I have said before, the goods could have been bought anywhere if the plaintiffs had seen fit to buy them in the market, and the defendants could not have objected that they had not been manufactured in some one of the mills of which the plaintiffs were agents.

It is obvious, therefore, that this was a sale of goods rather than a contract for work and labor, and that the case falls within the class mentioned by Judge HUNT in *Parsons v. Loucks* (48 N. Y. 20), when he says: "The present is not one of the border cases in which an embarrassing question is presented—as where wheat is sold, but the labor of threshing remains to be done; or a sale of flour which has yet to be ground from wheat, or the sale of timber that is to be cut and corded; nor where the defendants might procure other parties to manufacture the paper" (3 *Parsons on Cont.* 7 ed. star page 54).

Parsons v. Loucks was the precursor of *Millar v. Fitzgibbons* (9 *Daly*, 506), and is a support for it, if precedent were needed to sustain a sound principle.

The order and the judgment entered upon the order of the general term should be reversed and the judgment of the trial term affirmed, with costs.

LARREMORE and J. F. DALY, JJ., concurred.

Names of Parties.

A short opinion of the supreme court of Massachusetts by the Chief Justice (MORRIS) in *Jones v. Boston & Mystic Valley R.R. Co* (2 *New Eng. Rep.* 693), holds that in order to satisfy the Statute of Frauds, it is necessary the memorandum should show who are the parties to the contract: but it is sufficient if this appears by description instead of names, and then parol evidence is admissible to apply the description and identify the persons meant by it.

The contract in question was a guaranty indorsed on the back of a promissory note; and the guaranty thus indorsed did not contain the name of the guarantee or person in whose favor it was made. The court held that the evidence of the circumstances under which the note was taken pointed him out sufficiently to satisfy the statute.

Bridgman v. Trowbridge.

City Court.

Trial Term—April, 1885.

EDWARD C. BRIDGMAN ET AL. *against* CHARLOTTE
F. TROWBRIDGE.

The plaintiffs did business under the name of "The Railway Map and Publishing Co." The defendant gave one Taunton an order in the company's name for 1500 pamphlets. The contract was on an official blank of the company's on which the name of B. C. Prescott appeared as general manager, and S. D. L. Taunton as superintendent. There was a printed memorandum on the head: "Make all checks payable to the order of B. C. Prescott." Taunton collected the entire bill from the defendant in installments in money and checks, some of the checks being made to the order of Prescott and some to the order of Taunton. Taunton subsequently absconded, and the plaintiffs sued to recover the amount of the checks payable to Taunton's order, claiming the amount as a balance due on the contract, on the ground that Taunton had never accounted to the plaintiffs for the money. *Held*, that the payment to the superintendent was under the circumstances a good payment to the plaintiffs.

Clark Brooks, for plaintiffs.

Johnes, Benner & Wilcox, for defendant.

MCADAM, Ch. J.—[Orally.]—Taunton was the superintendent of the plaintiffs, and was held out to the public as such on the bill-heads and printed contracts of the firm. The responsible position which he held as "superintendent" of the plaintiff's business was a recommendation to the outside public that he was a reliable man. He made the contract sued upon, in the name of the Railway Map & Publishing Co., and he made all the collections of money which were made thereon. The defendant, so far as the

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testimony discloses, knew nothing of the plaintiffs, except that B. C. Prescott was the general manager of the Map Publishing Co., and that Taunton was its superintendent. Mr. Prescott told Mr. Taunton to collect this bill. He says he told Taunton to get a check for it, but it does not appear that the defendant was ever informed that there was any limit put upon Taunton's authority in the way of making collections; that is, it does not appear that the defendant knew that Taunton was told to get a check. The defendant was under no obligation to give a check; she had the right to pay in money, and the authority given to an agent to collect, includes every act necessary to a complete execution of the power, and authorizes the agent to collect in money, if the payment be made to him in that form. If a check be given to the agent on which the money is obtained by him, it has the same effect in law as if money had been paid in the first instance, because the result in each case is precisely the same.

Judge STORY, in his work on Agency, section 58, speaking of the mode of conferring authority on agents, says: "But whether it is conferred in the one way or the other, it is, unless the contrary manifestly appears to be the intent of the party, always construed to include all the necessary and usual means of executing it with effect. Thus, for example, if a general authority is given to collect, receive and pay all the debts due by or to the principal, it will occur to every one, who reflects upon the nature of such a trust, that numberless arrangements may be required fully to accomplish the end proposed; such as settling accounts, adjusting disputed claims, resisting unjust claims, answering or defending suits; and these subordinate powers (or, as they are sometimes called, mediate powers) are therefore, although not expressly given, understood to be included in, and a part of or incident to, the primary power. So, an authority given to recover and receive a debt, will authorize the attorney to arrest the debtor. So, an authority given to a broker to effect a policy, will

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authorize him to re-adjust a loss under that policy, and adopt all the means necessary to procure an adjustment. So, an authority to settle losses on a policy will include a power to refer the matter to arbitration. So, an authority to sell and convey lands for cash, includes an authority to receive the purchase money. So, an authority to make and enter into contracts for the purchase of grain, has been held to include the power to modify or waive a contract made by the agent in respect to grain," and so on. So that, under these principles, the agent Taunton, even if told to get a check for the money, had the subordinate or mediate power, in order to effectually carry out the object of his agency, to take money or a check to his own order, which, so long as it produced money, is practically the same thing as money. The master or principal, which ever you prefer to call him, is, as a rule responsible, for the dishonest acts of the servants whom he selects, upon the principle, that if one of two innocent persons must suffer by the wrong or fraud of a third, the loss must fall upon the one who employed the fraud and clothed him with the credit which gave him the power to make the fraud successful. The defendant has paid this bill; the plaintiffs' superintendent has proved dishonest. Who shall suffer? his employers, or a stranger who innocently paid their chosen servant under the supposition he was paying them? The equities are so strongly with the defendant that there is hardly any use in reserving my decision for further consideration. Every sense of justice requires that the defendant, having paid this bill once in good faith and without knowledge or notice that she was paying a dishonest servant, should not be required to pay it again. It follows therefore, that there must be judgment for the defendant.

This judgment was affirmed on appeal. On the same point, see *Scott v. Hopkins*, 25 *Weekly Dig.* 110.

Squier v. Townshend.

City Court.

Trid Term—April, 1885.

SQUIER *against* TOWNSHEND.

A contract to pay for the use of a party wall is personal to the builder, and does not pass to his grantee by a conveyance of the property. The contract to pay is also personal to the party contracting to pay, and is not discharged by his conveyance of the property, nor by the grantee's assumption of liability, or by the fact that the grantee used the wall.

MCADAM, Ch. J.—Upon the conceded facts I decide :

First. That the contract to pay for the party wall which was erected one-half upon the land of each of the parties litigant was personal to the plaintiff as the builder of the wall, and the right to receive the promised reward did not pass to the plaintiff's grantee (*Cole v. Hughes*, 54 *N. Y.* 444; *Scott v. McMillan*, 76 *Id.* 141; *Hart v. Lyon*, 90 *Id.* 663.)

Second. That the contract to pay for said wall, when used, by the defendant, was also personal to him, and was not discharged by his conveyance of the property, nor by the fact that his grantee and not the defendant in person used the wall. The right of the grantee to use the wall was inherent in and attached to the land which the defendant conveyed; it was appurtenant to it, and passed with the land to the grantee. The half of the wall for which compensation is claimed stood on the land which the defendant conveyed, and the defendant's grantee could not be prevented from using it. The conveyance made by the defendant, in legal effect, gave the grantee the right to use the wall, and the use of it by the grantee was therefore a use by the defendant's authority, and, within the con-

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templation of the agreement, a use by the defendant himself (see cases above cited, and *Lester v. Barrow*, 40 *Barb.* 297). The defendant must seek his remedy over against his grantee on the covenant to indemnify contained in his deed (*Lester v. Barrow*, *supra*).

Third. The conveyance executed by the plaintiff simply granted the half of the wall which stood on the lot he conveyed. His right to recover pay for the half which stood on the defendant's lot did not pass by the conveyance, because it was neither an appurtenant nor incident to the grant but independent of it. As between the defendant and his grantee, the half of the wall erected on the lot which he conveyed was appurtenant to the grant and passed by it, subject to the personal covenant of the defendant to pay for it when used. The grant having conferred upon the grantee the right to use the land conveyed, with its appurtenances, the use by the grantee was, as before remarked, a use by the defendant within the contemplation of the parties, and there is no legal reason why the stipulated price should not be paid.

The plaintiff is, therefore, entitled to judgment for \$491.60, with interest and costs.

City Court.

May, 1885.

IN RE ALBERT WILLIAMS, M. D.

In this State an uncle may lawfully marry his niece. The legislature has left the subject to the wisdom and good sense of the parties interested.

Albert Williams, M. D., having applied to have the ceremony performed, pursuant to a promise of marriage

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with his niece, the question has arisen whether, on the ground of affinity, there is any law of this State which disqualifies them from entering into the marriage state.

MCADAM, Ch. J.—The limit of prohibition among collateral kindred has been differently assigned in different countries, and the only branch of the question which need be considered here, is the condition of the law of this State bearing on the subject. In *Wightman v. Wightman* (4 Johns. Ch. 343, decided in 1820), it was held that marriages between brothers and sisters in the collateral line were, equally with those between persons in the lineal line of consanguinity, unlawful and void, as being plainly repugnant to the first principles of society, and the moral sense of the civilized world. Chancellor KENT, in referring to this case (2 Kent Comm. 83), said, "It would be difficult to carry the prohibition further without legislative sanction."

In *Wightman v. Wightman*, *supra*, the chancellor said: "Marriages out of the lineal line, and in the collateral line beyond the degree of brothers and sisters, could not well be declared void, as against the first principles of society. The laws and usages of all the nations to whom I have referred do, indeed, extend the prohibition to remoter degrees, but this is stepping out of the family circle; and I cannot put the prohibition on any other ground than positive institution. There is great diversity of usage on the subject. *Neque teneo, neque dicta refello*. The limitation must be left, until the legislature thinks proper to make some provision in the case, to the injunctions of religion, and to the control of manners and opinion." By the Revised Statutes which went into operation in 1830 (2 R. S. 139; 3 R. S. 6 ed. 147), "Marriages between parents and children, including grandparents and grandchildren of every degree, ascending and descending, and between the brothers and sisters of the half, as well as of the whole blood, are declared to be void."

Pfluger v. Cornell.

The prohibition extends no further. It does not reach the case of uncle and niece. There being no law of this State disqualifying the parties from being lawfully married, it is their privilege to have the ceremony performed. The legislature evidently intended to leave the question of marriage between uncle and niece to the wisdom and good sense of all the parties interested. They have concluded to enter the marriage state, and are entitled, under the laws of this commonwealth, to have the ceremony performed.

In England and some of the States marriages between uncles and nieces are void. The rule in New York is as declared above.

City Court.

Special Term—May, 1885.

PFLUGER *against* CORNELL.

A receiver appointed in supplementary proceedings cannot sell real estate, nor can the debtor be compelled to make a transfer of the real estate to the receiver unless it be situated in another State.

MCADAM, Ch. J.—Since the amendment of the Code in 1862 (chap. 460, § 15) and in 1863 (chap. 392, § 1) the rule laid down in 33 *Barb.* 498, has been changed, and the title to real estate belonging to the judgment debtor within this State passes to the receiver, upon recording in the county where the real property is situated a certified copy of the order of appointment (15 *Hun*, 190); and an order directing the transfer of such real property to the receiver is therefore unnecessary and improper (19 *Hun*, 500).

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As to real property situate without the State the rule is otherwise (37 *Barb.* 610); but as the only property of the judgment debtor herein is situated within this State, the application to compel a conveyance to the receiver must, for the reasons aforesaid, be denied.

As the legal title to the real estate was in the judgment debtor at the time the receiver was appointed, the latter succeeded to that title for certain purposes, but cannot sell it. To permit a sale by the receiver would be to deprive the debtor of his statutory right to redeem, which cannot be done (67 *How. Pr.* 424; 24 *Hun*, 526; 13 *Weekly Dig.* 384). The creditor may issue a new execution and sell all the right, title and interest in the real property which the debtor had on the day the judgment was docketed. This will effectually secure the legal rights of all the parties. As the statute furnishes this simple and complete remedy, the creditor should not be permitted to resort to a creditor's bill (of which a supplementary proceeding is a species) to enforce a legal lien enforceable without its aid. A creditor's bill is necessary only in cases where the legal title of the debtor is obscured or covered up by transfers of record in the names of others, by means of which the ordinary legal remedies of the creditor for the enforcement of the judgment are inadequate.

The motion for an order giving the receiver leave to sell the debtor's real estate will for these reasons be denied. The application to compel the debtor to deliver to the receiver the mining stock in his possession will be granted; no costs.

Kellogg v. Freeman.

City Court.

*Special Term—May, 1885.*HARRIS *against* SPADER.

Where a notice of appearance is served by an individual as attorney for defendant and a notice of motion is subsequently served in a firm name, without first entering an order of substitution, the service is irregular.

MCADAM, Ch. J.—Every pleading or notice must be subscribed by the attorney of record (*Code*, § 421), and to make a substitution effective, an order should be entered and notice given (*Bliss Code*, vol. 1, p. 39, note *j*). Where a notice of appearance is served by an individual, as attorney for the defendant, and a notice of motion is subsequently served in a firm name, without first entering an order of substitution, the notice is irregular, and the objection to it on that ground is fatal.

Motion dismissed.

City Court.*Special Term—May, 1885.*KELLOGG *against* FREEMAN.

An affidavit in supplementary proceedings should allege that the defendant is a resident or has a place of business within the county—either is sufficient. If the plaintiff proceeds on both grounds he must do so in the conjunctive.

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MCADAM, Ch. J.—An affidavit in supplementary proceedings which follows the alternative wording of the statute,—that the defendant is a resident or has a place of business within the county, is not sufficient (1 *Code Rep.* 38). It should allege either “that the defendant is a resident,” or “that he has a place of business with the county,” for either will suffice. If it be true that the defendant is a resident and also has a place of business within the county, the fact ought to be alleged in the conjunctive, in order to satisfy the rules of practice.

Motion to vacate order granted, without costs.

City Court.

Trial Term—June, 1885.

JOSEPH BYRNE *against* ROBERT CROOKS ET AL.

Ordinarily, possession of property obtained by means of legal proceedings, and by due course of law, does not render the person so possessing themselves wrongdoers in any sense which makes them guilty of conversion, either in taking or maintaining the possession which the law has given them.

Proceedings in claim and delivery against a bailee generally conclude the bailor, by reason of the privity existing between them.

James M. Lyddy, for plaintiff.

John L. Hill, for defendant.

MCADAM, Ch. J.—The action is for conversion, and the complaint alleges that the defendants wrongfully took and carried away 58 boxes of tin, from the possession, custody and care of James M. Lyddy, and wrongfully and

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unlawfully thereafter converted the same to their own use. Lyddy was at the time the general assignee of Joseph Byrne & Co. He was subsequently discharged from his trust, and, by order of the court, made a re-assignment of the firm's assets to the plaintiff, who brings this action, claiming \$449.50 damages.

The question presented is whether there was a conversion by the defendants, and its determination depends upon the following facts: Crooks & Co., the defendants, were the vendors of the tin, and shipped it from Liverpool to said firm of Joseph H. Byrne & Co., of New York, per steamship *Lady Francis* of the Shamrock line. The vendees accepted a draft for the purchase price, which has not been paid. The tin, upon its arrival, was placed by the vendees on storage at the German American Storage Warehouse. The goods arrived in New York about June 10, 1881, and on June 21, 1881, the vendors undertook their right of stopping the goods *in transitu*, in consequence of having learned that the vendees had made a general assignment for the benefit of creditors. In the assertion of this right the vendors were unsuccessful, and on July 12, 1881, they commenced an action of claim and delivery in the supreme court, in which the German American Storage Co., as the custodian of the property, was made a party defendant. The action was founded on the allegation that the property in question belonged to Crooks & Co. (the defendants herein), plaintiffs therein; that although sold to Byrne & Co., it had never been formally delivered to them; that Byrne & Co. had failed and made a general assignment for the benefit of creditors, and that the plaintiffs in said action had elected to avail themselves of the privilege of stopping the goods *in transitu*. The papers in that action were served upon the German American Storage Company, and, there being no exceptions to the sureties, and no counter-bond, the property claimed was delivered over to the plaintiffs in that action (the defendants in this). The action was in disaffir-

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mance of the sale, for its purpose was to reclaim the property. By force of this legal proceeding, the plaintiffs therein (defendants here) became possessed of the property in question.

Ordinarily, possession obtained by means of legal proceedings and by due course of law, does not constitute an illegal act, nor does it render the persons so possessing themselves wrongdoers in any sense which makes them guilty of conversion, either in taking or maintaining the possession which the law has given them. But the plaintiff herein contends that as neither he nor his assignee were parties to such proceedings, they are not bound thereby, and that possession obtained under such circumstances does not preclude them from asserting their rights and title in an independent action for conversion.

If Byrne & Co., or Lyddy, their assignee, had possession of the property, it was by virtue of the fact that the German American Storage Company held possession for them, as their bailees. Bailees, like pledgees, may maintain any action against a wrongdoer in respect to the property in their charge, and recovery by either bars an action by the other (*Freeman on Judgm.* § 166; *Story on Bailm.* § 94; *Green v. Clarke*, 12 N. Y. 343; *Bowen v. Fenner*, 40 Barb. 383; *Marsden v. Cornell*, 62 N. Y. 221, 222). Replevin, being a possessory action, in the nature of proceeding *in rem*, it may be maintained by the true owner of property against a bailee or pledgee holding possession thereof for another. In such an action, ample provision has been made for the bailor or pledgor to intervene, and present his claim (see *Code*, § 170.); and where a person, not a party to the action, has an interest in the subject thereof, or in real property, the title to which may in any manner be affected by the judgment, and makes application to the court to made a party, it must direct him to be brought in by the proper amendment (*Code*, § 452).

The German American Storage Company was not a stranger to the plaintiff herein, nor to Mr. Lyddy. It was

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their agent in respect to the property claimed, and it owed them the duty of notifying them of the proceedings taken to recover the property. If it failed to perform that duty, it must account for its neglect to the plaintiff for whatever consequences it has caused. But such neglect cannot make the defendants herein wrongdoers, in taking legal measures to reclaim their property. The term parties, in the legal sense of the term as applied to to litigations, is not restricted to those who are parties upon the record, but extends to all who have a direct interest in the result of the suit,—a right to make defense or control the proceedings (*Burr v. Bigler*, 16 *Abb. Pr.* 177), as well as to those who might have come in as a party (*O'Brien v. Heeney*, 2 *Edw.* 242).

It does not appear what has become of the action brought by Crooks & Co. against the German American Storage Co., whether it is still pending or how it terminated, if tried. If it has already terminated in favor of the Storage Company, or should ultimately terminate in its favor, the property taken will be returned to it, if return thereof can be had, or, if such return be impossible, the value of the property may be recovered and the plaintiff may in that way eventually find an ample remedy for his grievance through its bailee and agent. But, whatever the condition of that action may be, or however it has or may terminate, I think the present action is not maintainable on the evidence.

For these reasons, and without considering the other evidence offered, the complaint will be dismissed, with costs.

When Trespass will not lie.

City Court, Trial Term, March, 1887, ELLEN CORNELL v. THOMAS FELL, Surviving Partner, &c.

MCADAM, Ch. J.—The property was taken from the plaintiff under proceedings of claim and delivery thereof, instituted in the Seventh District court. They were taken by a city marshal in the

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performance of his official duties, so that the taking was an act of the law for which trespass will not lie (see *Hall v. Waterbury*, 5 *Abb. N. C.* 374, and cases cited). The requisition was never set aside, so that the principle declared in *Kerr v. Mount* (18 *N. Y.* 659) has no application.

The defendant in that action (plaintiff here) had a right to counter-bond, but did not exercise the privilege, and consequently must be held to have elected to rely upon the result of that action and the security of the undertaking, furnished by the plaintiff preliminary to the issuing of the requisition. The action in the district court was tried, but the justice, having allowed the statutory time to go by, failed to decide the controversy, and the action in consequence abated. This was the fault of the court, and not the act of the party, and does not make the original taking under lawful process tortious. The action having abated, the remedy of the defendant (plaintiff here), was by action on the undertaking given by the plaintiff, which, among other things, provided that, if the action abates or is discontinued, the property is to be returned to the defendant (plaintiff here). The failure to return the property is the breach for which the sureties are liable. The case of *Evarts v. Kiehl* (102 *N. Y.* 296), was an action against a justice for not deciding an action for claim and delivery, in consequence of which the sureties of the plaintiff were obliged to pay the defendant in the action the value of a truck taken in said replevin proceedings and not returned after the action had abated by the justice's failure to decide.

The court of appeals decided that the justice was not liable.

The present action for trespass is misconceived and not maintainable, and the complaint therein must be dismissed, with costs.

Judgment for Conversion, if paid, changes Title to the Property converted.

If in trover for conversion the owner has judgment for the value of the goods, which is paid, and the goods remain in the possession of the defendant, the title in the property is changed and the wrong-doer becomes the owner (*Marsden v. Cornell*, 62 *N. Y.* 220).

Brown v. Nichols.

City Court.

Trial Term—June, 1885.

BROWN *against* NICHOLS.

The rule as to sufficiency of offers, stated. Verification and omission, effect of. Counter-claim, effect of. How the question of interest is regulated in determining the sufficiency of the offer.

McADAM, Ch. J.—An unverified offer to allow judgment, signed by the defendant's attorney, is a nullity, and the plaintiff waives nothing by retaining it and proceeding in the action (*Code*, § 740; 14 *Hum*, 387; 78 *N. Y.* 586; 17 *Hum*, 515; 56 *How. Pr.* 247). The offer is not amendable (14 *Abb. N. C.* 96), nor is it in any case effectual unless served at least ten days before the action is reached for trial (2 *Abb. N. C.* 90; 10 *Hum*, 1.1; 7 *How. Pr.* 161). If, after making the offer, the defendant pleads a counter-claim which is proved and allowed on the trial, its amount will be considered as part of the plaintiff's recovery for the purpose of determining the question of costs, because the law will not permit the defendant, by pleading a counter-claim, after making the offer to change the status of the parties as fixed at the time the offer was served (36 *N. Y.* 75); but if the counter-claim be pleaded at the time of or after the service of the offer, so that the plaintiff is sufficiently informed of it, the rule is otherwise, and the plaintiff must accept or reject the offer at his peril, or be concluded as to costs by the amount of the verdict (63 *N. Y.* 261).

Independently of the question of counter-claim, if the damages claimed are not in their nature unliquidated, the court, in determining whether the recovery is more favorable than the offer, must reject the interest which accrued

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between the time of the offer and the rendition of the judgment; that is, in all cases wherein the recovery is made up of principal and interest (26 *How. Pr.* 398; 47 *N. Y.* 1); but this rule does not extend to actions wherein unliquidated damages are recovered, for in such cases interest cannot be added to the offer made, for the purpose of depriving the plaintiff of costs (57 *N. Y.* 652).

Applying these rules to the case at bar, it is clear that the plaintiff and not the defendant, is entitled to costs.

Effect of offer where Complaint Amended.

In *WOLFFLE v. SCHMEUZER* (*City Court, Special Term, March 15, 1887*), it appeared that the complaint contained three counts, aggregating about \$450. Defendant offered judgment for \$130 with costs, and with the offer served an answer pleading nonjoinder as to two of the counts and taking issue on the third. The plaintiff amended his complaint by leaving the two counts out and claiming judgment on the third alone for \$150. On the trial, he had a judgment for \$105. Both sides claimed costs. The clerk taxed the bill presented by plaintiff, and defendant appealed. The following decision was made.

HALL, J.—The offer of judgment was properly served, and has never been withdrawn, and the judgment recovered by plaintiff is less favorable than the offer. There has been no amendment to the pleadings which could possibly affect the offer of judgment. The defendant, in his answer to the original complaint, claimed that if he was individually liable at all, it was only upon the first cause of action, and it was in respect to this that the offer was made; but if it had been accepted at the time it was made, it would have extinguished the counter-claim so far as defendant was concerned, although the joint counter-claim could not properly be pleaded by him individually. The amended answer did not set up any counter-claim nor any new defense which could in any manner interfere with the offer, and plaintiff has always been in a position to accept the offer if he chose.

The taxation of the clerk will be reversed, and the plaintiff's costs taxed only up to the time of the offer, and the defendant's costs will be taxed from that time.

Parker v. Totten.

City Court.

Trial Term—June, 1885.

CHARLES PARKER *against* JOHN TOTTEN.

The plaintiff, a workman in defendant's employ, was excavating on the defendant's land so near his neighbor's lot that the wall upon the neighbor's land fell into the excavation and injured the plaintiff, who sued his employer to recover damages. *Held*, that as the danger was not within the peculiar knowledge of the defendant, but alike apparent to the plaintiff and defendant, and as either might have foreseen it by the exercise of ordinary intelligence, the plaintiff was guilty of contributory negligence, and could not recover. In other words, there was mutual and co-operating negligence on the part of both master and servant which deprived the latter of any remedy against the former.

C. D. Rust, for plaintiff.

W. H. De Wolf, for defendant.

MCADAM, Ch. J.—The plaintiff sues to recover damages for injuries received by him while excavating on the defendant's land, so near his neighbor's lot that the wall upon the neighbor's land fell into the excavation and did the damage complained of. It was claimed that the defendant was guilty of negligence because his foreman ordered the work to be done. But the difficulty is, that the facts which charge the defendant with negligence inculcate the plaintiff to such an extent that the responsibility cannot be divided. If the defendant's foreman was guilty of negligence in ordering the work to be done, the men employed were equally negligent in doing it: that is to say, if the work was *per se* dangerous, they had the same means of knowing the danger that the foreman had.

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If the foreman could reasonably have foretold the risk, it was because the peril was transparent to the eye and might have been observed by the plaintiff as easily as by the foreman.

Wharton, in his book on Negligence (section 300), lays it down as an elementary rule that a person who, by his negligence, exposes himself to injury, cannot recover damages for the injury thus received. The common law imposes upon every one in the full possession of his faculties, when approaching a known place of danger, the exercise of that degree of prudence, care and caution incumbent upon a person of ordinary reason and intelligence in like circumstances (2 *Thompson on Neg.* 1149). It will not do to say that the defendant's foreman was guilty of negligence for telling the men to excavate in a dangerous place, and in the same breath urge that the men who undertook the work with the same means of information and knowledge possessed by the foreman, were not equally negligent with him. There is no pretense that the defendant or his foreman had any means of knowing of the danger not possessed by the plaintiff. It was the mutual and co-operating negligence of the plaintiff and defendant's foreman that did the damage, and no recovery can be had in such a case. The danger was not a secret or hidden one, but consisted of a wall which stood erect over the excavation, which any one in the excavation could see, and which any one in the possession of his faculties could have observed at a glance was in danger of falling into the excavation if not properly supported by timbers or the like; and, being forewarned of his danger, the plaintiff ought to have avoided it in some way, and not having done so, cannot now complain of the consequences of his indiscretion. The danger in the nature of things increased as the excavation progressed.

Cooley on Torts (p. 674) lays it down as a rule of contributory negligence that if the plaintiff or party injured,

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by the exercise of ordinary care under the circumstances, might have avoided the consequences of the defendant's negligence, but did not, the case is one of mutual fault, and the law will neither cast all the consequences upon the defendant nor will it attempt any apportionment thereof.

The plaintiff knew that the defendant had made no effort to support the wall, and had not erected posts or taken any means to prevent its falling. This omission of care was visible to the eye and must have been apparent to everyone in the excavation, and the danger which threatened and subsequently followed could have been anticipated by the exercise of ordinary care and prudence.

As before remarked, the defendant may have been guilty of negligence, but the difficulty is that the facts which prove negligence associate the plaintiff with the accident to the extent of making him liable for contributory negligence, on the theory of mutual or co-operating neglect.

The defendant did not guarantee the safety of the plaintiff, nor had he given the plaintiff any assurance that the work was safe, or that there was no danger of the wall falling. In other words, the plaintiff as well as the defendant assumed the chances of whatever danger there might be, neither suspecting that the injury would follow. It is not a case of defective appliances or dangerous machinery furnished by the master, and which he is bound to furnish in a safe condition for the purposes intended, and the rules regulating that class of cases have no application to the one at bar. Under the circumstances, the complaint must be dismissed.

Where the dangers of an employment are obvious, or are well known to the servant, instruction and warning as to them are not required of the master (*Wendling v. Bainbridge*, 25 *Week. Dig.* 481).

O'Hara v. Lamson & Goodnow Mfg. Co.

City Court.

Special Term — June, 1885.

LISSBERGER ET AL. v. SCHOENBERG METAL CO.

The court may grant an allowance not only on the amount of the plaintiff's claim, but of any counter-claim extinguished by the verdict.

MCADAM, Ch. J.—The cases reported in 62 *How. Pr.* 180, and 66 *How. Pr.* 342, sustain the claim of the plaintiffs that they are entitled to the allowance not only on the plaintiff's recovery, but on the counter-claim which was extinguished. Those cases certainly place a very liberal construction on the rule in regard to allowances to counsel, but as I must accept them as a correct interpretation of the law, it follows that the plaintiffs are entitled to have their allowance taxed in conformity to these decisions. The clerk will be ordered to retax accordingly.

City Court.

Trial Term—June, 1885.

O'HARA against LAMSON & GOODNOW MANUFACTURING CO.

A corporation, unless restrained by statute, may employ servants of any class necessary for the prosecution of the business, in the same manner as may be done by natural persons. Parol evidence is admissible to prove the official character of the persons who acted as defendant's officers. Effect of continuing employee after the expiration of the hiring, considered.

O'Hara v. Lamson & Goodnow Mfg. Co.

McADAM, Ch. J.—The answer admits that the plaintiff was employed by the defendant, and alleges that he was discharged for cause. The employment being admitted, we are left to inquire the duration of the employment, and whether the grounds of discharge were true. The jury having found against the defendant on both of these issues, their finding settles the fact that the plaintiff was employed by the year, and was wrongfully discharged before his term of service expired. The verdict is therefore conclusive on the defendant.

The rule is that a corporation, unless restrained by statute, may employ servants of any class necessary for the prosecution of its business, in the same manner as may be done by natural persons, and subject to the same liability (*Wood on Master and Servant*, § 37; *Field on Corp.* § 193). And when a person is employed by a corporation, by one assuming to act on its behalf, and renders services according to the agreement, with the knowledge of its officers, and without objection on their part, the corporation will be held to have sanctioned the contract, and will be compelled to pay for the services according to the agreement (*Fister v. La Rue*, 15 *Barb.* 323; *Hooker v. Eagle Bank*, 30 *N. Y.* 86). Parol evidence is admissible to prove the official character of persons who acted as defendant's officers, without producing the records of the corporation (*Pusey v. N. J. R.R. Co.*, 14 *Abb. N. S.* 435).

The plaintiff was originally employed for one year by the manager of the New York office, and his services were continued by the assent of the corporation into the second and from thence into the third year, at a fixed yearly salary, and the law will presume (there being no evidence to the contrary) that the continued services were rendered on the same terms (*Wood, supra*, § 96).

There was sufficient evidence to warrant the verdict, and the motion for a new trial must be denied. No costs.

Daly v. Mouroe.

City Court.

Trial Term—June, 1885.

DALY *against* MOUROE.

The master of a vessel, as general agent of the owners, has authority in the home port to bind them by his contract for necessities.

An undisclosed principal is not liable if the goods were charged to the agent, and the principal, in ignorance that any claim is made on him, pays the demand to the agent.

MCADAM, Ch. J.—While it is true, that the master of a vessel, as general agent of the owners, has authority in the home port to bind them by his contract for necessities (9 *N. Y.* 235; 48 *Barb.* 144, 145). the evidence shows that Captain Towns was not appointed master until after the claim in suit had been contracted, so that the principle invoked has no application. The further theory that Towns acted as the agent of the defendant, and that the latter is liable as an undisclosed principal, is inapplicable, because the defendant, in ignorance of the assumed agency, and under the belief that Towns was principal, paid him before the plaintiff made any demand upon him (1 *Daly*, 145, 412; 9 *B. & C.* 78, 88). The complaint was, therefore, properly dismissed, and the motion for a new trial must be denied.

Authority of Master of Ship.

As to the authority of the master of a ship to make contracts, see *Story on Agency*, §§ 116, 161, 294, 296. In general, the master is personally responsible, as well as the owner, upon all contracts made by him within the ordinary scope of his powers, whether they be in writing or otherwise (*Ib.*).

The owners of a trading ship are bound to the performance of every lawful contract made by the master relative to the usual

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employment of the ship (*Abbott on Shipp.* 8 ed. 124). In the home port, the master's presumed power as agent for the owners, will bind them for all proper contracts for fitting out, victualling and repairing the ship, unless it shall be shown that the owners themselves, or a ship's husband, managed the vessel, and that the party contracting with the master was aware of this (*Dixon Law of Shipp.* 40). The master is the presumed and accredited agent of the owners in fitting out, victualling and repairing the ship abroad; and for his engagements in these respects, or even for money borrowed for the purpose of furnishing necessities for the ship, the owners will be bound, provided the loan appears to be fairly supported by evidence of existing necessities (*Hurry v. Allen*, 6 *Mass.* 163; *James v. Bixby*, 11 *Id.* 34; *Wainwright v. Crawford*, 4 *Dall.* 225; *Millward v. Hallet*, 2 *Caines*, 77). But he is not considered as the general agent of the owners; his authority is limited solely to the objects and purposes of the voyage (*Mervin v. Shailer*, 12 *Conn.* 489). The master is a general agent to perform all things relating to the usual employment of his ship; and his authority, as such agent, to perform such things as are necessary in the line of business in which he is employed, cannot be limited by any private orders not known to the party in any way dealing with him. He is not the agent of the owners to settle any claims against the vessel, or against them, except such as accrue during the time he is master (*Kelly v. Merrill*, 14 *Maine*, 228).

The ground of the owner's liability for acts of the master is : 1st. The authority to act for them, of which his position furnishes presumptive evidence. 2d. The fact that the owners receive the benefit of the contract; and consequent presumption that arises thereon is that it was made at their instance and request (*James v. Bixby*, 11 *Mass.* 34; *Buxton v. Lull*, 1 *Ves.* 154; *Dane v. Hallock*, 4 *Pick.* 458).

Master Liable for Negligence.

The master of a general or carrier ship, as well as the owner, is liable for the misfeasance, negligence and want of care of all persons to whom the management of the vessel is intrusted (*Story on Agency*, §§ 315, 316).

Liability of Undisclosed Principal.

A party contracting with an agent is not concluded from resorting to the principal, unless it distinctly appears that, with full

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knowledge of all the facts, he elected to hold the agent and abandon the claim against the principal. Unless defendant proves this, the plaintiff may hold either, and neither is discharged till the claim is paid (*Meeker v. Cleghorn*, 44 *N. Y.* 349; *Butler v. Evening Mail Assn.*, 61 *Id.* 634; *Coleman v. First Nat. Bk.*, 53 *Id.* 388; *Cobb v. Knapp*, 71 *Id.* 348).

Exception to rule as to Liability of Principal.

There appears to be an exception to the rule that a person who has dealt with an agent, believing him to be the principal, can sue the principal when disclosed, to the effect that no such suit can be maintained, if, after the liability was incurred, anything has occurred to make it unjust that the undisclosed principal should be called upon to make the payment. The question has usually arisen when a commission merchant has bought goods for an undisclosed principal, and the principal has in good faith paid the commission merchant before the vendor has made any claim upon the principal. There is a very striking contrariety of opinion, however, in the authorities, particularly the English cases, as to the true nature of this exception. Some cases hold that if anything has occurred by which the undisclosed principal has changed his position to his prejudice, that discharges him (*Thompson v. Davenport*, 9 *B. & C.* 88; *Smyth v. Anderson*, 7 *C. B.* 21; *Armstrong v. Stokes*, *L. R. Q. B.* 598; *Smethurst v. Mitchell*, 1 *El. & El.* 621). Other cases hold that the principal is not discharged, unless the party seeking to hold him liable has induced him, either by some act or by laches, to change his position to his prejudice (*Waring v. Favinck*, 1 *Camp.* 85; *Kymer v. Sumercropp*, 1 *Camp.* 109; *Heald v. Kenworthy*, 10 *Erch.* 745; *Irvin v. Watson*, *L. R. 5 Q. B. Div.* 102; *S. C. on appeal*, *Id.* 414; *Davison v. Donaldson*, *L. R. Q. B. Div.* 623). The cases in this State seem to hold that it is sufficient to exonerate the principal that he has paid the agent, or that it would be inequitable for any reason to hold him (*Laing v. Butler*, 37 *Hun.* 144; *Knapp v. Simon*, 96 *N. Y.* 284; *Fish v. Wood*, 4 *E. D. Smith*, 327; *Rowman v. Buttman*, 1 *Daly*, 412; *McCullough v. Thompson*, 45 *N. Y. Super. Ct.* 449.)

People *àr rel.* Howard *v.* Boswick.

New York Supreme Court.

*Special Term—June, 1885.*THE PEOPLE *ex rel.* HOWARD *against* BOSWICK
AND THIRD DISTRICT COURT.

If a justice has jurisdiction of summary proceedings he cannot be prohibited from adjudging upon the questions involved, and it cannot be presumed that he will announce an erroneous judgment. The question of prohibition, considered.

LAWRENCE, J.—In *Exp. Brandlacht* (2 *Hill*, 367) the supreme court of this State held that the court has a discretion to grant or deny a writ of prohibition. To the same effect is the case of the People *ex rel.* New York Consolidated Stage Co. *v.* Court of Common Pleas (43 *Barb.* 278). The object of the writ is to prevent the exercise by a tribunal possessing judicial powers of jurisdiction of matters not within its cognizance, or to prevent it from exceeding its jurisdiction in matters within its cognizance. It does not lie to restrain a ministerial act, nor can it take the place of a writ of error or other proceeding to review judicial action, or of a suit in equity to prevent or redress fraud (*Thomson v. Tracy*, 60 *N. Y.* 31; see also *Appo v. People*, 20 *Id.* 531; *People v. McAdam*, 84 *Id.* 287). And the writ will be refused where the general scope or purpose of the action is within the jurisdiction of the inferior court; an overstepping of its authority in a portion of its judgment, or any other error in its proceedings, being a ground of appeal or review, but not of prohibition (See opinion of CLERKE, J., in *People ex rel. New York Consolidated Stage Co v. Court of Common Pleas*, 43 *Barb.* 281). And in *People ex rel. Bean v. Rus-*

People *ex rel.* Howard v. Boswick.

sell (49 Barb. 351), LEONARD, J., held that the fact that a tenant has a good defense to the proceedings will not entitle him to restrain a magistrate from entertaining them. He also held that if the judge has jurisdiction of that class of proceedings, he cannot be prohibited from adjudging upon the question of the termination or expiration of the term, and that it cannot be assumed that he will pronounce an erroneous judgment, but that, on the contrary, the presumption of law is that he will decide correctly; that the tenant must await his decision, and that, if it be erroneous, he has his remedy by certiorari or by an action for damages.

If we apply the principles laid down in these cases to the case at bar, I am of the opinion that the court should not, in the exercise of its discretion, grant a writ of prohibition absolute, but should quash the alternative writ heretofore issued. No decision has yet been rendered by the justice of the district court, and if the law is as contended for by the relator's counsel, I must assume that the justice will so declare it. In the exercise of a discretionary power, the court should bear in mind the equitable rights of the parties. In this case, on the papers and proofs submitted to me, I find no equities on the part of the relator. Confessedly, his term has expired, and he stands upon the strictly technical point that between him and one to whom his landlord has let the whole building known as the Newton Flats, the conventional relation of landlord and tenant does not exist. Why he assumes to hold over does not appear. He therefore does not seem to me to have made out a case which renders it obligatory upon the court to exercise its discretionary power in his favor. The writ asked for is one of the gravest known to the law, and it should be withheld, even where, within the strict letter of the law, the court might issue it, if its issuance would appear upon the whole case not to be conducive to justice and right.

I am strengthened in these views by the consideration

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that if the relator has any rights they can be protected by an appeal. In such cases it has always been held that the writ ought not to issue (*People v. Marine Court*, 36 *Barb.* 341; *People v. Brandlacht*, 2 *Hill*, 367; *People v. Clute*, 42 *How. Pr.* 157). Under section 2260 of the Code of Civil Procedure the relator is entitled to appeal from any final order made by the justice, and while, under the exception contained in section 2262 as to the City of New York, the relator cannot obtain a stay pending the appeal, by the provisions of section 2263, if the final order is reversed upon appeal, the relator will be entitled to restitution of the premises. If it should be said that this is not an adequate remedy, the conclusive answer seems to be that it is the remedy which to the Legislature seemed adequate and appropriate.

For these reasons, I shall, in the exercise of my discretion, refuse to grant a writ absolute, and shall quash the the alternative writ, with costs.

City Court.

Trial Term—June, 1885.

ANTHONY *against* HERZBERG.

The statute of limitations operates on the remedy merely, and does not extinguish the debt; and a payment on account revives the remedy, whether it be made before or after the statute has once attached.

MCADAM, Ch. J.—The statute of limitations operates on the remedy merely, and does not extinguish the debt. A payment made on account of the debt is evidence from which a promise to pay the balance due may be inferred,

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if the circumstances are consistent with such intent (66 N. Y. 352; 11 Barb. 554; 46 Id. 167; 36 N. Y. 86). The principle on which payment operates to take the case out of the operation of the statute is that the party paying intended by it to acknowledge and admit the greater debt to be due. The effect of a part payment is derived from the decisions of the courts, which have become part of the common law, which section 395 of the Code in terms leaves unimpaired. From the part payment the law implies a promise to pay the residue, and the unpaid part of the debt is, by a legal presumption, renewed and made to date from the time of the part payment (2 N. Y., 523; 53 Id. 442). In some of the States it has been decided that the payment which revives the debt must be made before the statute attaches, but in this State it has been held that it matters not whether the payment be made before or after the statute has commenced to run (*Dean v. Hewitt*, 5 Wend. 262). Judge MARCY, in that case, argues that the new promise rebuts the presumption of payment upon which the statute of limitations proceeds, and has the same effect in keeping alive the remedy, whether made before or after the statute attaches (*Carshore v. Huyck*, 6 Barb. 586; *Van Keuren v. Parmelee*, 2 N. Y. 525). The action was properly brought upon the original demand (12 N. Y. 635), and the new promise proved on the trial kept alive the remedy.

Motion for new trial denied. No costs.

Peculiarities of the Statute as applicable:

- 1st. To makers and indorsers of demand notes.
- 2d. To a loan of money and a deposit of money.

City Court, Trial Term, November, 1885. McADAM, Ch. J.—The statute of limitations as construed by the courts presents some peculiar features. The maker of a demand note is liable thereon without demand. As to him, it is a demand due presently; an action thereon lies against him at once, and a suit commenced more than six years after date of the note is barred by the statute (89 N. Y. 456). But as against the indorser of the same note the statute does not

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begin to run until after demand of payment has actually been made of the maker, and an action against the indorser brought at any time within six years after such demand is not barred (98 *N. Y.* 379). If money is loaned, the right of action is barred at the end of six years after the loan is made, but if it be a deposit of money instead, the statute does not run until six years after demand made therefor (74 *N. Y.* 482 ; 29 *Ill.* 166, 167 ; 6 *Hill*, 297). These distinctions, though subtle, are well established by authorities, and prevent the running of the statute in this case. In addition to this, the new promise in writing takes the case out of the operation of the statute. The verdict rendered has warrant in law, and the application for a new trial must be denied.

City Court.

*Trial Term—June, 1885.*GOODE *against* ALT ET AL.

Where a judgment is recovered against a marshal who acted under a bond of indemnity, there is a breach of the obligation, and the marshal may maintain an action without first paying the judgment. Notice to the sureties of the original suit was necessary, so as to enable them to elect whether they would as indemnitors defend the action. The notice may be served on the attorney or one of the sureties.

MCADAM, Ch. J.—The condition of the bond is that sureties “will keep said Goode (the marshal) harmless, and pay any judgment that may be recovered for the taking of said property.” The record shows that judgment was recovered against the marshal for said taking, December 18, 1884, for \$272.45. The failure of the sureties to pay this judgment constituted a breach of the condition of the bond, and gave rise at once to a cause of action without payment of the judgment by the marshal (John-

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son v. Gilbert, 9 *Hun*, 469). The Code, section 1427, provides that the officer to whom such a bond is given, cannot maintain an action thereupon, unless he gives notice to the sureties of the pendency of the action against the officer, so that the indemnitors may elect whether they will apply to be substituted as defendants, as prescribed in section 1421 of the act. The notice required to be given may be served upon the attorney who obtained the process on which the officer acted, or upon "one" of the sureties on the bond of indemnity. The complaint alleges that "the defendants had due notice" of such an action. The defendant Saenger, who alone defends, denies that "he" had any notice thereof, and "denies, upon information and belief," that his co-surety had any such notice. Such a denial is not authorized by the Code, and creates no triable issue (58 *How. Pr.* 312 ; 33 *Hun*, 143, 544). This rule may seem technical, but the supreme court, in the case last cited, on an application for reargument, declined to recede from it (33 *Hun*, 544). As the bond sued upon was not only conditioned to save the officer harmless, but to pay any judgment recovered against him, the application of this rule of pleading to the present case is not oppressive.

Motion for new trial denied. No costs.

City Court.

Trial Term—June, 1885.

BURGESS *against* BROOKLYN CLOCK CO.

The defendant made a promissory note for \$1,500 to the order of the Mount Morris Bank. The note recited that the maker had depos-

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ited with the payees, as collateral security, Emery E. Child's note indorsed by Burgess & Goddard for \$6,180. The plaintiff purchased the note in suit from the payees, and received with it the collateral note, from which they erased the names of the indorsers. *Held*, that the plaintiff was bound to keep the collaterals so as to be able to surrender them, without mutilation or injury, at the trial, and that erasing the name of the indorsers on the collaterals relieved the defendant from liability on the note in suit.

MCADAM, Ch. J.—The action is upon a promissory note made by the defendant for \$1,500, payable March 2, 1885, to the order of the Mount Morris Bank. The note recites that the maker has deposited with the payees, as collateral security, Emery E. Child's note, indorsed by Burgess & Goddard, for \$6,180, dated January 25, 1885, payable six months after date. The plaintiff purchased the note in suit from the payees, and received with it the collateral note, from which he erased the names of the indorsers, Burgess & Goddard. This erasure presents the grounds upon which the defendant resists payment of the note in suit, claiming, as it does, that on paying said note it is entitled to have the collateral returned un mutilated. The mutilation is not pleaded, but the defendant alleges, and on the trial proved, that it has been at all times ready to pay the note in suit upon surrender of the collateral, had frequently offered to pay the same, and that the plaintiff always refused to surrender the collateral on receiving payment of said note. Upon presentation of the collateral in court, the mutilation for the first time appeared, whereupon the defendant raised the objection that on account of such mutilation the plaintiff had incapacitated himself from making the necessary surrender of the collateral on payment of the note in suit, and that in consequence no recovery could be had by the plaintiff. The note in suit was purchased from the Mount Morris Bank on the 6th day of March, 1885, after its maturity, and the plaintiff by his purchase succeeded to the rights of the bank, and acquired no greater privileges. As against

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the bank, or the plaintiff as its assignee, the maker of the note was as much entitled to a return of the collaterals, on payment of the note in suit, as it was to have the note in suit returned, and the plaintiff was bound to keep the collateral in readiness to be surrendered on payment (*Ocean Nat'l Bank v. Faut*, 50 *N. Y.* 474; *Stewart v. Bigler*, 98 *Penn.* 80; *Jones on Pledges*, § 596; *Colebrooke Collateral Securities*, § 106). In other words, the plaintiff was obliged to hold the collateral faithfully for the purposes for which it was assigned (*Burnett v. Austin*, 81 *N. Y.* 321).

The plaintiff ought to have kept the collaterals in the same condition they were when they were pledged with the Mount Morris Bank, and he certainly had no right to erase and destroy indorsements and discharge liabilities thereon; on the contrary, the law imposed on the pledgee the duty of presenting the collaterals at maturity and of charging the indorsers, and he impliedly engaged to do so (*Edwards on Bailm.* 2 ed. §§ 240, 241; *Colebrooke Collateral Securities*, § 114). The plaintiff offered to prove that the collateral note was made and delivered to the Brooklyn Clock Company to raise money for its benefit, and that its use for other purposes was a diversion; but the offer was rejected. Goddard is not a party to the record, and is not therefore before the court, and the plaintiff had no right to make a defense for him to the collateral note; he was a joint indorser with Burgess on that instrument, and had the right to waive any defense he might have had to the note, and might have elected to pay it when called upon to do so. Whether there was or was not a defense by Burgess and Goddard to the collateral note was a question which should have been left until the occasion required that issue to be determined, and the equities of all the parties in respect thereto could then have been appropriately presented and decided.

Upon the case, as it stands, the complaint must be dismissed, with costs.

Briggs v. Berls.

City Court.

Special Term—July, 1885.

BRIGGS *against* BERLS.

The defendant obtained a warrant for the arrest of one Clarke for keeping a disorderly house, and for the arrest of "all vile and improper persons found on the premises,"—this being the usual form of warrant in such cases. The plaintiff was arrested by the police under this warrant. *Held*, that as he was not named in it the defendant was not liable.

Grab net warrants condemned.

MCADAM, Ch. J.—The complaint made by the defendant before the police magistrate charged one Clarke with keeping a disorderly house at No. 602 Sixth avenue, and prayed for a warrant against Clarke and "all vile, disorderly and improper persons found upon said premises." The magistrate issued his warrant upon this complaint, but it is nowhere alleged that the defendant applied for or in any manner directed the arrest of the plaintiff, or that he was mentioned *eo nomine* in the warrant. Under such circumstances, the defendant, although perhaps the indirect cause of the plaintiff's arrest, is in no manner legally responsible for it, as it was not the legitimate or necessary consequence of her act. If the plaintiff was illegally arrested and imprisoned upon the complaint made by the defendant, it was in consequence of the improper conduct of the police in executing lawful process in an illegal manner, and in failing to discriminate as to the true offenders, for which indiscretion the officer and not the defendant is liable. If the plaintiff was not vile and disorderly, he was in no way referred to in the complaint or warrant. If he was either, he was properly arrested,

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irrespective of the motive in making the charge against Clarke.

These "grab net" warrants are innovations on every sound principle of law, and the police should be very careful against whom they execute them, for if they arrest innocent persons the warrant will afford no protection to the officer. But this concerns only the police, and not the defendant, who gave no direction concerning the method in which the warrant should be executed, and in no way designated the plaintiff as a proper subject for arrest. The defendant made no charge against the plaintiff, and, for all that appears to the contrary, never heard of him prior to the arrest. His arrest was probably improper, but the officer and not the defendant is answerable for this, for the reasons before stated.

It follows, therefore, that the count for malicious prosecution cannot be maintained, and that the demurrer thereto must be sustained, with costs.

City Court.

Special Term—July, 1885.

BANNERMAN *against* QUACKENBUSH ET AL.

Where the defendant is defeated at the trial, and succeeds upon appeal in having the judgment reversed, with costs "to the appellant" to abide the event, and the plaintiff succeeds upon the new trial, he cannot tax in his favor the costs upon the appeal.

McADAM, Ch. J.—Where the general term of the city court affirms a judgment in favor of the plaintiff, with costs, and the common pleas reverse the judgment and order a new trial, with costs "to the appellant" to abide

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the event, the plaintiff (respondent), in case he succeeds upon the new trial, cannot tax the costs either of the city court general term or the common pleas general term. The order of the general term affirming the judgment "with costs" having been reversed, "its entire effect was wiped out" (*Murtha v. Curley*, 3 *Civ. Pro.* 266; 92 *N. Y.* 359). The plaintiff has succeeded upon the new trial, and the clerk has taxed in his favor the costs of the two general terms aforesaid.

The taxation will be reversed as to the costs of the two general terms, aggregating \$120, and the disbursements incurred thereon, amounting to \$6.50. These items, amounting to \$126.50, will be deducted from \$319.75, the bill as taxed, leaving \$192.50 as the proper amount. At this sum the taxation will be affirmed.

City Court.

Trial Term—July, 1885.

ROOT *against* GOODSPEED.

The defendant stipulated to try the cause on June 26, or suffer an inquest. He failed to appear on that day, and moved to open the default on the ground that he was out of town on that day, and could not be present. *Held*, no excuse.

MCADAM, Ch. J.—The action was called on the day calendar on June 19, 1885, and was adjourned till the 26th, "on condition that defendant goes on trial on the 26th or consents to an inquest." This condition was incorporated in a written stipulation signed by the respective attorneys. On June 26 an inquest was taken. Application is now

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made to open the default, and the excuse offered is that on the 26 "the defendant was out of the State on an important business transaction, and that she could not be present at the trial without great financial loss, far exceeding the amount involved in this suit."

The application to open the default will be denied on two grounds: 1. The written stipulation authorized the inquest. 2. The excuse offered is insufficient. The court "may relieve a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect" (*Code*, § 724); but not where he deliberately neglects the opportunity of having his day in court, for business which he regards as of more importance. The true rule is that in legal matters all other business must be laid aside, that the party litigant may appear and defend his rights. He must waive either for the other, and may make his choice, but, having made his election, he must abide by it.

Motion denied, with \$10 costs.

City Court.

Special Term — July, 1885.

GREENLICH *against* ROSE.

The validity of an execution cannot be inquired into on the return of an order in supplementary proceedings. The remedy is by special motion.

MCADAM, Ch. J.—The judgment was recovered June 22, 1878, and the execution was issued June 8, 1885, about seven years afterwards. It has been returned wholly unsatisfied. The validity of the execution cannot be

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inquired into on the return of an order in supplementary proceedings (*Sanford v. Sinclair*, 8 *Paige*, 3/3; *Union Bank v. Sargeant*, 53 *Barb.* 422; 35 *How. Pr.* 87). It can be attacked only on a special motion to set the execution aside. The motion to vacate the supplemental order will therefore be denied. * Unless the defendant submits to an examination thereunder on the 20th inst., at 10 A.M., an attachment will be issued.

City Court.

Special Term—July, 1885.

HERBERT *against* DRAKE. (TWO CASES.)

Where the action is *in forma pauperis*, it cannot be stayed on account of the non-payment of costs awarded against the plaintiff in a previous action.

McADAM, Ch. J.—The plaintiff brought suit in the supreme court against the defendant on the same cause of action involved here, and judgments for costs were recovered on demurrer against the plaintiff, aggregating \$120.45 in each case. The plaintiff thereupon brought the present suits in this court, on the same cause of action, and the defendant applies for a stay of all proceedings in these actions until the costs of the former actions in the supreme court are paid. Ordinarily, the motions would be granted as of course. But the plaintiff brought the present actions *in forma pauperis*, and this feature presents the question to be decided. Daniels (1 *Ch. Pr.* 29) says: "It seems doubtful whether, after a dismissal of a former suit, a plaintiff will be permitted to sue again for the same matter *in forma pauperis* without paying the

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costs of the first suit." But all doubt as to the practice is removed by section 461 of the Code, which provides that the plaintiff "shall not be prevented from prosecuting the same by reason of his being liable for the costs of a former action brought by him against the same defendant." In *Lyons v. Murat* (4 Abb. N. C. 13), relied on by the defendant, the costs were incurred in the same action prior to the leave to sue *in forma pauperis*, and, on the ground that the order did not relate back to the commencement of the suit, the action was stayed until such costs were paid. That exceptional case does not apply to the present actions, which come within the express provision of section 461 (*supra*), which controls. Application denied ; no costs.

N. Y. Court of Appeals.

October, 1885.

RICHARD ROLLINS, PLAINTIFF AND RESPONDENT, *against* PATRICK FARLEY, DEFENDANT AND APPELLANT.

Where the evidence fairly raises the question whether an explosion of cartridges was caused by contact with a steam-pipe under the charge of the defendant's employee, and by reason of his negligence, or by spontaneous combustion originating from a defect in the manufacture, the question presented is one of fact for the jury ; and, where there is evidence sustaining the former conclusion in preference to the latter, a verdict of the jury against the defendant, holding him liable for negligence, will not be disturbed.

The plaintiff sued to recover damages for injuries done to his property by an explosion of dynamite cartridges known as "bolognas," under the following circumstances :

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In November, 1881, the defendant, who is a contractor, was engaged in removing rock from certain lots on the north side of Seventy-third street, between Second and Third avenues, in the city of New York. On the 21st of that month an explosion of cartridges occurred which shattered the buildings in the neighborhood, breaking glasses, injuring the plastering and doing other damage. The plaintiff, on his own behalf and as assignee of five other property owners, brought the present action to recover for the injury done to their property.

Judge MCADAM, before whom the action was tried in the city court, November 10, 1882, declined to dismiss the complaint; and the jury found for the plaintiff. The judgment having been affirmed on appeal by the city court and common pleas general terms, the defendant, by leave of the latter court, appealed to the court of appeals.

E. P. Wilder, for appellant.

J. P. Reed, for respondent.

FINCH, J.—The argument in behalf of the defendant founded upon his proof tends to demonstrate that the cartridges ought not to have exploded at all; and did so without any assignable reason. Concussion, as cause or occasion, is very clearly put beyond the range of admissible theories, for the proof shows that no one was near to throw a missile or strike a blow; and the explosion followed ignition and was consequent upon that. How the cartridges took fire became the question in the case, and the inquiry very soon settled down to a choice between the two alternatives, of ignition from the heat of the steam-pipe, or spontaneous combustion, originating in some unknown and unsuspected defect in the manufacture. The latter has no evidence to support it, unless the former is so utterly disproved as to make such defect the only possible explanation. That is the contention on

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behalf of defendant, and the verdict of the jury to the contrary is assailed as wholly without evidence to support it and conclusively disproved.

The plaintiff proved the defendant's own admission that the explosion was caused by the steam-pipe, and his promise to pay the damages which resulted. The defendant denied it, but the jury were at liberty to believe, and, we must assume, did believe, the fact of the admission. It had a peculiar force and significance from some attendant circumstances. The defendant was not present at the occurrence itself. He came upon the ground after the explosion. He could know nothing of it except from noticing its locality and from inquiry. The man who thawed out the cartridges and placed them on the ground awaiting their use was Monahan, the defendant's foreman, who had charge of them, and knew, if anybody did, what caused the explosion. Presumably, the defendant inquired of Monahan and received his explanation, and, with knowledge thus acquired, admitted that placing the cartridges on the steam-pipe occasioned the explosion. And what makes this more significant is the fact that Monahan was not called as a witness, and the only explanation given of his absence is that the defendant told him to quit work and come to the trial, and defendant did not know the cause of his absence. The witness of all others most important to the discovery of the truth was missing without apparent reason. The jury were entitled, first, to believe the making of the admission, and next, that it was made from knowledge derived from Monahan at the time.

But it is said the possibility of this theory of the cause of the explosion was utterly disproved, because it was shown that the cartridges could not have been laid upon the steam-pipe, since that was buried in the earth; that they could only explode at a heat of three hundred and seventy degrees, and that the engine, carrying but eighty pounds of steam, could not heat the pipe to that degree.

The pipe was buried in the earth, but the boiler-house

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stood on the sidewalk and the steam-pipe to run the drills passed perpendicularly down the side of the house before it entered the ground. The evidence does not directly show whether this perpendicular section was outside or inside of the boiler-house. If inside, contact with the cartridges as they were placed would have been utterly impossible. But it may have been, and probably was, on the outside ; in which case actual contact was possible at the point where the descending pipe reached the surface of the ground. The defendant's proof is, however, that the cartridges lay from one to three feet from the steam-pipe ; but none of the witnesses were near enough to the powder to make their observation at all reliable. Monahan, who laid them down, might have accurately known, but he did not testify. Henry Bennett says the cartridges "might have been a foot or two feet" from the pipe ; but he was seventy-five or one hundred feet away, and is the only witness called upon that subject, although others among the workmen were nearer. There were ten or fifteen of these cartridges in the pile which exploded, and it is quite certain that one of them at the bottom of the heap might have been in actual contact with the pipe, while to an observer some distance off, the pile might seem to have been a foot away. So that the possibility, and therefore the probability, of actual contact is not conclusively disproved.

It is further said, however, that a heat of three hundred and seventy degrees is requisite to an explosion, and that the steam under a pressure of eighty pounds would not possess a heat greater than two hundred and eighty degrees. But no witness tells us at what heat the powder would ignite, unless it be Dowdney, who was a contractor, and who said it would require a heat high enough to ignite paper. That assumes that the paper covering the powder had no opening or breaks in it, and that none occurred in the process of handling, and further takes no account of the great probability that the paper covering

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might so absorb the qualities of the powder as to ignite with very little less of difficulty than the powder itself. But Ditman, a manufacturer of the article, swore that if the carriages were put directly on the pipe and the steam was very high, an explosion might result. Dowdney said they might explode at a temperature of two hundred and fifty degrees, if confined so that the gases would not escape. We are thus without proof of the heat necessary to ignition, and that is the vital point of the case; for the explosion was caused by ignition, and one of the experts explained the fact. These cartridges, placed in a pile and lighted at the top, would burn down to an ash without explosion, but lighted at the bottom accumulate heat in the pile until the exploding temperature was reached. All agree that the powder smoked, and then burned for some period before the explosion,—one of defendant's witnesses putting that period at two or three minutes; and it is further testified that the side of the boiler-house took fire, and of course added its heat. Given the fact of ignition, and the consequent explosion is entirely plain, and the defendant utterly fails to show at what heat the cartridges in contact with a steam-pipe would ignite.

As to the evidence of the heat of the steam-pipe several suggestions occur. The steam begins to form near the boiling point of water, and, at one hundred pounds of pressure, is described as heated to about two hundred and eighty degrees. But does that necessarily show the heat of the pipe? May not the iron grow many degrees hotter? There is no proof upon that subject. One witness, asked if the pipe was hot, answered with emphasis, "decidedly." The cartridges had already been made sensitive by the process of thawing, and if Monahan laid them down so that some of them touched the hot iron of the pipe, it is not made impossible by the evidence that ignition followed as a consequence. At all events, the proofs fairly raised for the consideration of the jury the question whether the cartridges were fired by contact

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with the pipe, and so through the negligence of Monahan, or by spontaneous combustion originating in a defect of manufacture.

The proof permitted and indicated the former conclusion in preference to the latter, and the verdict of the jury had evidence to support it. The judgment should be affirmed.

All concur.

JUDGE McADAM'S CHARGE.

Gentlemen: The plaintiff, in his own right, and as assignee of five others, brings this action to recover \$291.19 for damages done to the property of the plaintiff and his five assignors, by an explosion which occurred on November 21, 1881, on certain lots on the north side of Seventy-third street, between Second and Third avenues, in the city of New York,

That an explosion occurred on that day is conceded, but how it originated is clouded in doubt and uncertainty, no light whatever having been thrown in upon the subject, excepting that which may be drawn or gathered from the fact that some ten, twelve or more explosives called by the experts "bolognas," and used in blasting rocks, were stored on the ground in question near the engine-house which ran the drill for blasting, and that these were discovered to be on fire by Mr. Bennett, the engineer, that greenish smoke and fire resembling that which comes from a Roman candle was seen to arise, and that the flame grew heavier and heavier until the final explosion occurred, shattering the doors and windows of all the houses in the neighborhood and doing the damage of which the plaintiff complains.

That the plaintiff and his assignors were sufferers by this explosion is clearly established, but whether the defendant is bound to respond to the plaintiff for these damages depends upon several considerations which you will be required to pass upon.

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In the first place, I charge you that the defendant is not liable for the injuries claimed, unless the explosion was the result of negligence upon the part of the defendant or his employees. Negligence must in the nature of things depend upon some act of commission or omission; that is to say, the party complained of must, in order to be guilty of negligence, commit some act which is pernicious and dangerous in itself, or he must omit to exercise the care which, under the circumstances, men of ordinary prudence would naturally give to the subject in charge.

Having the "bolognas" on the lots in question for the purpose of blasting was not unlawful, and does not, in itself, impose on the defendant any responsibility for the explosion which followed, unless you find as matter of fact that there was some act of negligence in the use, mode of storage or handling of the "bolognas" the consequences of which caused the damage for which a recovery is sought.

The supreme court, in *Heeg v. Licht* (16 *Hun.* 258), said: "Gunpowder is an article of commerce, and may be lawfully manufactured, kept and sold. The right to store and keep it must ensue from the right to make and sell it. There is nothing inherent in the thing itself which makes it obnoxious to the senses, or dangerous to either life, health or property. Its character and qualities are well understood, and with proper care and caution it may be handled with security and used with safety. The danger of the article consists in its liability to ignite and cause an explosion, and the necessity for interfering with its use, or the place of its deposit, arises from this quality. If it be kept in such a place and in such a manner as to be dangerous to life or property, it is doubtless a public nuisance, and whether or not it be such, in any particular case, depends upon circumstances, the most prominent and important of which are the place and mode of keeping, and the quantity kept." That is the rule as laid down by the supreme court, and I state it to you as

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the law. Unless, therefore, you find negligence upon the part of the defendant, find a verdict in his favor, for he is not liable, if the explosion was the result of an unavoidable accident.

If, however, you find that the explosion was the result of negligence upon the part of the defendant or his employees, either in the place of deposit or the mode of handling of these bolognas, then it will be your duty to find a verdict for the plaintiff and assess the damages which he and his five assignors suffered, in such sum as the evidence establishes, not exceeding \$291.19, the amount claimed.

Defendant's Counsel.—I request the court to charge : 1st. That the burden of proof is on the plaintiff to show negligence, and not on the defendant to show absence of it.

THE COURT.—I so charge.

Defendant's Counsel.—2d. That if this injury occurred through some unaccountable cause which could not be foreseen, the defendant is not liable.

THE COURT.—I charge that. In other words, if it was an unavoidable accident, he is not liable.

The jury found a verdict for the plaintiff, and against the defendant, for the sum of \$291.19.

Care required from those having Explosives.

As to liability for the explosion of steam-boilers, see 1 *Thompson on Neg.* 112 ; 2 *Id.* 990 ; *Losee v. Buchanan*, 51 N. Y. 476 ; *Marshall v. Wellwood*, 38 N. J. L. 339 ; *Jaffe v. Harteau*, 56 N. Y. 398. The amount of care required seems to be nothing more than ordinary care, measured by the perils of the particular situation (2 *Thompson on Neg.* § 990). Where an excess of steam is carried, see *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 136 ; S. C., 17 Am. R. 221.

Liability for Damages caused by Blasting Rocks.

On this subject, see 1 *Thompson on Neg.* 113, where the cases are collated. See also *Hay v. Cohoes Co.*, 2 N. Y. 159.

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Liability for Explosion of Fire-works.

As to this liability, see *Wharton on Neg.* § 881; *Conklin v. Thompson*, 29 *Barb.* 218.

Liability for explosion of Fire-arms.

An adult is liable who carelessly gives a loaded gun to a child or inexperienced person (*Dixon v. Bell*, 5 *M. & S.* 198).

Alternative Perils.

If the defendant's negligence puts the plaintiff in a position in which he is forced to make a perilous choice of alternatives and is injured, the defendant is liable for the consequences (see *Wharton on Neg.* §§ 93, *et seq.* and cases cited).

City Court.

Trial Term—November, 1885.

HERMAN MOSES against ASA D. DICKINSON.

In order to maintain an action for malicious prosecution, the plaintiff is required to prove that the proceeding was instituted without probable cause, and was malicious.

The question of probable cause depends upon the prosecutor's belief, based upon reasonable grounds, such as would lead a discreet person to the belief that a crime had been committed.

Trial by the court without a jury.

Max Altmyer, for plaintiff.

D. Gerber, for defendant.

MCADAM, Ch. J.—The defendant is credit clerk of Bates, Reed & Cooley, merchants, of this city. The plaintiff

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iff applied to that firm for credit, and, in order to procure it, represented to the defendant, on or about March 21, 1882, that he was commencing business with :

Cash.....	\$2,500
Notes, &c.....	1,500

Making.....\$4,000

—and owed nothing whatever. On the faith of this statement, the firm credited him with goods aggregating \$283.31. Subsequently, the plaintiff applied for an increased line of credit, and, in order to obtain it, made a statement of his condition. The parties differ as to the extent of that statement. The defendant swears that he took it down in writing at the time, in these words :

“ BATES, REED & COOLEY,
New York, October 23, 1882.

Name. Herman Moses.

Address. Providence, R. I.

Salesman. Buckner.

States. Has just married the daughter of Schwarzfelder the big butcher of Washington market, and shows me \$2,000 in cash and deed for house and lot in One Hundred and Seventh street, worth \$12,000; think him all right now.

A. D. D.”

Buckner, the salesman, corroborated the defendant as far as possible, as to the fact that the defendant made these representations. The plaintiff obtained credit to the extent of \$700, or thereabouts, and failed within four months thereafter, owing \$18,000 to \$19,000, with assets ranging in value (according to the evidence), from \$5,000 to \$14,000, and the assigned estate has since paid but a small dividend. After the failure, the defendant made a complaint before a police magistrate, and procured the plaintiff's arrest on the ground that he had obtained the goods in question upon a false statement as to his responsibility.

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The plaintiff gave bail, and, upon the examination subsequently had, was discharged. The present action is for malicious prosecution.

In order to maintain the action, the plaintiff is required to prove that the proceeding was instituted without probable cause, and that the motive in instituting it was malicious (*Cooley on Torts*, 180, 181); for it is the right of every man to institute or set on foot criminal proceedings whenever he believes a public offense has been committed (*Ib.*). In *Fagnan v. Knox* (66 N. Y. 528), the court said: "The question of what constitutes probable cause does not depend upon whether the offense has been committed in fact, nor whether the accused is guilty or innocent, but upon the prosecutor's belief, based upon reasonable grounds. The prosecutor may act upon appearances, and if the apparent facts are such that a discreet or prudent person would be led to the belief that the accused had committed a crime, he will not be liable in this action, although it may turn out that the accused was innocent." The court adds: "If there is an honest belief of guilt, and there exists reasonable grounds for such belief, the party will be justified."

In *Thaule v. Krekeler* (81 N. Y. 428), the old rule is re-affirmed, that, "in an action for malicious prosecution, it is for the plaintiff to establish affirmatively the want of a reasonable and probable cause for the prosecution, and that it was instituted for malice."

The proof offered by the plaintiff does not meet these requirements.

It does not appear that the defendant had any personal grievance against the plaintiff, or any ill will which he desired to gratify, or any purpose of his own he wished to accomplish by the plaintiff's arrest and possible conviction. He was merely an employee of a large dry goods house, and, believing that a wrong had been done, he first stated the facts to counsel of the firm, who advised an

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arrest of the plaintiff. Acting upon this advice, the facts were laid before a police magistrate, who, regarding them as sufficient, issued the warrant upon which the arrest was made.

In an action for false imprisonment, Judge EMMOT held: "If a person merely communicates facts or circumstances of suspicion to officers, leaving them to act on their own judgment and responsibility, he is not liable to an action therefor" (39 *Barb.* 264).

Judge COOLEY says that "the want of probable cause will not be inferred from the mere failure of the prosecution" (*Cooley on Torts*, 184).

The facts disclosed upon the trial do not show such an absence of probable cause as to imply malice on the part of the defendant. There were circumstances disclosed, which, on their face, and without satisfactory explanation, certainly looked suspicious. The presentation in October, 188 , of the \$2,000 in money, with the deed of a \$12,000 house, and marrying the daughter of a rich butcher, and, within four months thereafter, failing owing \$18,000 to \$19, 00 to various creditors for bills contracted.

Acting on these facts, on the advice of counsel, and with the approval of the police magistrate, the arrest was made. I cannot find, or infer from the proofs offered, that there was no probable cause, as there is every indication from the proofs that there was probable cause, without malice upon the part of the defendant, who acted, not for his own personal interest or gain, but for the protection of his employers and the public.

The arrest of the plaintiff was unfortunate, the day on which it was made was indeed an inconvenient one for the plaintiff, but the defendant did not know this, and is not, therefore, responsible for it. Upon the entire case, and principally for want of proof of the absence of probable cause and the existence of malice, there must be judgment for the defendant, with costs.

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How Reversal of Judgment Affects Probable Cause for Prosecution.

A decision just rendered by the supreme court of the United States holds that the reversal of a judgment which supported a prosecution does not deprive that judgment of its quality as evidence of probable cause when an action for malicious prosecution is brought.

The circumstances of the case were somewhat peculiar, but the decision is none the less authoritative.

The Crescent City Slaughter House Company, after having established the validity of its monopoly in 16 *Wall.* 36,—the famous "Slaughter House Cases,"—was vexed with a rival, the Butchers' Union Slaughter House Company, which claimed the right to be under subsequent Louisiana legislation. The courts of Louisiana sustained this right, and the Crescent City Company then resorted to the United States circuit court, where it filed an injunction bill, and gave the usual injunction bond. The circuit court sustained the bill; but its judgment was reversed in the supreme court of the United States, on the ground that the monopoly conferred by the police power did not vest in contract, but might be taken away by the same power (111 *U. S.* 746).

The Butchers' Union Company then sued on the injunction bond, and with the demand thereon, against the Crescent City Company and its surety—a demand against the company alone for malicious prosecution.

This practice, by the way, ought to be allowed by our Code if the two causes of action can both be pressed.

The trial judge declined to hold that the successful judgment in the United States court was evidence of probable cause, but left this question to the jury, criticising that judgment as "both remarkable and extraordinary," on the ground, as he explained in his bill of exceptions, that it set at defiance the decision of the State court, and the positive mandate of the State constitution, and had been subsequently held wrong by the supreme court of the United States.

Mr. Justice MATHEWS, in delivering the opinion on the present appeal, held this to be error. He supports, by careful examination of the authorities, the doctrine that success in the prosecution is competent evidence of probable cause, notwithstanding subsequent reversal of the adjudication. His analysis of the authorities is as follows :

In the case of *Senecal v. Smith* (9 *Robinson*, 240), it had been pre-

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viously decided that "in cases of this kind it is well settled that malice and the want of probable cause in the original action are essential ingredients. Malice may be expressly proved, or it may be inferred from the total want of a probable cause of action; but malice alone, however great, if there be a probable cause upon which the suit or prosecution is based, is insufficient to maintain an action in damages for a malicious prosecution."

In the case of *Gould v. Gardner* (8 *La. Ann.* 21) it was determined that the defendants in the case were not without probable cause for the arrest of the plaintiff, which was the ground of the action, because they acted by the advice of eminent and learned counsel, though his opinion was held to be erroneous. The court refer to the case of *Stone v. Swift* (4 *Pickering*, 389) in Massachusetts, and that of *Foshay v. Ferguson* (2 *Denio*, 619) in New York as sufficient authority in support of their opinion, and add as follows: "Our code and statutes have not provided any rules to guide us on the trial of such actions, and we are governed, in the absence of positive legislation, by the rules laid down in the authorities quoted, because we consider them just and reasonable in themselves." In the opinion in the present case, the supreme court of Louisiana say that to sustain the charge of malicious prosecution it is necessary to show: "1st, that the suit had terminated unfavorably to the prosecutor; 2d, that in bringing it the prosecutor had acted without probable cause; 3d, that he was actuated by legal malice,—*i. e.*, by improper or sinister motives. The above three elements must concur."

And when there is no dispute of fact, the question of probable cause is a question of law for the determination of the court (*Stewart v. Sanneborn*, 98 *U. S.* 187, 194). Want of probable cause and the existence of malice, either express or implied, must both concur to entitle the plaintiff in an action for a malicious prosecution, to recover. So that if probable cause is shown, the defense is perfect, notwithstanding the defendant in instituting and carrying on the action may have been actuated solely by a motive and intent of malice. If he had probable cause to institute his action, the motives by which he was actuated and the purposes he had in view are not material.

How much weight as proof of probable cause shall be attributed to the judgment of the court in the original action, when subsequently reversed for error, may admit of some question. It does not appear to have been judicially determined in Louisiana. In the case of *Griffin v. Sellars* (4 *Dev. & B.* 177), *RUFFIN*, Ch. J., said "that probable cause is judicially ascertained by the verdict of the jury and

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judgment of the court thereon, although upon an appeal a contrary verdict and judgment be given in a higher court." In *Whitney v. Peckham* (15 *Mass.* 243), such a judgment was held to be conclusive in favor of the existence of probable cause. To the same effect is *Herman v. Brockerhoff* (8 *Watts*, 240), in an opinion of Chief Justice GIBSON. The decision in the case of *Whitney v. Peckham* (*ubi supra*), however, was questioned by the supreme court of New York in the case of *Burt v. Place* (4 *Wendell*, 591, 598), where MARCY, J., delivering the opinion of the court, said that the Massachusetts decision rested entirely upon *Reynolds v. Kennedy* (1 *Wilson*, 232), which had been qualified by the decision of EYRE, Baron of the Exchequer, in *Johnstone v. Sutton* (1 *T. R.* 505), and by what was said by Lord MANSFIELD and Lord LOUGHBOROUGH in the same case, which came before them on a writ of error (1 *T. R.* 512). The effect of these English authorities, as stated by MARCY, J., in *Burt v. Place* (*ubi supra*) is as follows: "That if it appears by the plaintiff's own declaration that the prosecution which he charges to have been malicious, was before a tribunal having jurisdiction, and was there decided in favor of the plaintiff in that court, nothing appearing to fix on him any unfair means in conducting the suit, the court will regard the judgment in favor of the prosecution satisfactory evidence of probable cause."

In that case the judgment relied upon by the defendant was held not to be conclusive. The reason is stated to be as follows: "Though the plaintiff admits in his declaration that the suits instituted before the magistrate by the defendant were decided against him, he sufficiently countervails the effect of that admission by alleging that the defendant, well knowing that he had no cause of action, and that the plaintiff had a full defense, prevented the plaintiff from procuring the necessary evidence to make out that defense by causing him to be detained a prisoner until the judgments were obtained, and by alleging that the imprisonment was for the very purpose of preventing a defense to the actions."

Commenting on this case, the court of appeals of Kentucky, in *Spring v. Besore* (12 *B. Monroe*, 551, 555), say: "The principle settled in the case last cited we understand to be, that such a judgment will not in every possible state of case be deemed to be conclusive of the question of probable cause; but that, like judgments in other cases, its effect may be destroyed by showing that it was procured by fraud or other undue means." That court proceeds to state the rule as follows: "The correct doctrine on the subject is, in our opinion, that the decree or judgment in favor of the plaintiff,

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although it be afterwards reversed, is, in cases where the parties have appeared and proof has been heard on both sides, conclusive evidence of probable cause, unless other matters be relied upon to impeach the judgment or decree and show that it was obtained by fraud; and in that case it is indispensable that such matter should be alleged in the plaintiff's declaration; for, unless it be done, as the other facts which have to be stated establish the existence of probable cause, the declaration is suicidal. The plaintiff's declaration will itself always furnish evidence of probable cause when it states, as it must do, the proceedings that have taken place in the suit alleged to be malicious, and shows that a judgment or decree has been rendered against the plaintiff. To counteract the effect of the judgment or decree and the legal deduction of probable cause, it is incumbent upon him to make it appear in his declaration that such judgment or decree was unfairly obtained, and was the result of acts of malice, fraud and oppression on the part of the defendant, designed and having the effect to deprive him of the opportunity and necessary means to have defeated the suit and obtained a judgment in his favor."

The limitations upon the general principle declared in *Burt v. Place* (*ubi supra*) were followed by the supreme court of Maine in *Witham v. Gowen* (14 *Maine*, 362), and both decisions were referred to in the subsequent case of *Payson v. Caswell* (22 *Maine*, 212, 226), where the court said: "In these two cases we have instances of exceptions to the general rule, indicative of the general nature of the characteristics which might be expected to attend them; but the rule itself remains unimpaired. If there be a conviction before a magistrate having jurisdiction of the subject matter, not obtained by undue means, it will be conclusive evidence of probable cause."

The propriety of this limitation of the rule seems to have been admitted by the supreme judicial court of Massachusetts in *Bacon v. Towne* (4 *Cush.* 217, 236), though in later cases it reiterated the broader rule as originally stated in *Whitney v. Peckham*, *ubi supra*. (*Parker v. Huntington*, 7 *Gray*, 36).

This seems to reconcile the apparent contradiction in the authorities, and states the rule, which we think to be well grounded in reason, fair and just to both parties, and consistent with the principle on which the action for malicious prosecution is founded.

It is, perhaps, not material in this case to define the rule with precision, and to attempt to state with accuracy the precise effect to be given to a judgment or decree of the court as proof of probable cause under all circumstances, because in the present case the

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decree of the circuit court of the United States was adjudged to be entitled to no effect whatever as evidence in support of the defense of the plaintiff in error.—*Daily Reg.*, February 16, 1886.

City Court.

Trial Term—November, 1885.

[**MANGELS against SCHOEN, AS TREASURER OF THE
GREENWICH LITERARY SOCIETY.**

A member of an unincorporated society may sue it for money loaned, by bringing an action against it in the name of its president or treasurer. Having the power to borrow money the society may issue obligations for its payment.

A society may sue its members for unpaid dues.

MCADAM, Ch. J.—Voluntary unincorporated associations (like the defendant herein) are commonly called joint stock companies, and may, by force of the statute, sue and be sued in the name of the president or treasurer for the time being. While not corporations, they possess many of the attributes peculiar to corporations. While the members, as between themselves, are not partners, they are subject to many of the legal liabilities and disabilities of partners. But, as between an individual member on the one hand and the association in its official capacity on the other, it is to be regarded as a *quasi* corporation, capable of being sued by such member for any breach of its official obligations, of which the agreement to pay benefits to a sick brother is a familiar illustration. While the association may be sued by a member, he may in turn be sued by it. Thus, if the individual member be in arrears for dues or the like, the association may by an action in

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the name of its president or treasurer, enforce the payment of such arrearages. This mode of procedure and regulation as to parties results from the statute which introduced a new rule of practice of great utility and convenience (1 *City Ct. R.* 376, 239 ; 5 *Civ. Pro.* 194). The action in its present form is therefore maintainable. The plaintiff loaned money to the association, and the bonds issued by it were mere evidences of the loan. Having power to borrow money to meet its expenses, the authority to issue evidence of the loan follows (42 *Barb.* 122 ; 3 *Wend.* 94 ; 4 *Hill*, 261 ; *Angell & A. on Corp.* 10 ed. § 257).

The verdict in favor of the plaintiff was properly directed, and the motion for a new trial must be denied.

City Court.

Trial Term—December, 1885.

DANIEL BERTOLET *against* JOSEPH J.
O'DONOHUE ET AL.

A merchandise broker, paid for a particular service, cannot recover for commissions on future sales to be made, unless he controls or influences the continued trade of the customers introduced. He cannot recover commissions on future sales to the United States government ; for any contract which implies influence with government officials, not possessed by others, is void. He can recover in such case only for actual services rendered, and not for his supposed influence in respect to future dealings.

Motion for new trial on the minutes.

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MCADAM, Ch. J.—A merchandise broker who introduces a customer may lawfully contract for commissions on sales then made and all future sales which may be made to the person so introduced, with this qualification: that if paid commission on the service actually performed at the time of the introduction, the broker can recover on subsequent sales only so long as he can control the customer and influence his trade. If, however, the customer declines to be longer controlled or influenced by the broker, and refuses to make further purchases unless it be at the lowest net prices, without brokerage, and sales are made in this way, in good faith and without collusion, the broker cannot recover commissions on such subsequent sales. To hold otherwise would be to favor the restraint of trade, and to acknowledge a sort of ownership in the customer by the broker—a principle which no law can recognize. Such a contract as to commissions on future sales to the United States government is void as against public policy. Government officials must solicit sealed proposals for supplies and patronize the lowest responsible bidder, and the contract which implies the existence of a standing influence over them in favor of any particular person the broker may recommend is contrary to every principle of good government, and cannot be sanctioned or enforced by any court. A party may employ a broker to assist in a sale to the government, and may bind himself to pay for services actually rendered in the negotiations, for this is legitimate work, as some one must conduct the negotiations; but beyond this, anything looking toward influence which others do not possess, and which seeks to prevent or crush open competition for government work or supplies, introduces a feature into the contract which neither commends itself in a business or a legal sense. It is pernicious in its effect, and for this reason illegal. The plaintiff has been paid for all services actually rendered, and, for the reasons stated, cannot recover commissions on the subsequent

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sales for which he claims compensation, and in respect to which he performed no services.

The complaint was properly dismissed, and the motion for a new trial must be denied, but without costs.

City Court.

General Term—December, 1885.

JENNINGS, ADMINISTRATOR, &c., PLAINTIFF AND APPELLANT *against* OSBORNE, DEFENDANT AND RESPONDENT.

Where an administrator is a party, his declarations and admissions are evidence against him.

A plea of payment is supported only by proof of payment in money or its equivalent.

Appeal from a judgment rendered on verdict in favor of the defendant.

C. Bainbridge Smith, for plaintiff and appellant.

Cantor & Seldner, for defendant and respondent.

MCADAM, Ch. J.—The action was brought on two promissory notes made by the defendant—one for \$500 and the other for \$1,000. The sole defense pleaded is payment. Upon the trial, the defendant undertook to prove his defense, in three different ways, two of which are unobjectionable, and one is fatal to the verdict, which was in his favor.

First. He proved conversations had between the intestate in his life-time, and third persons, in which the

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payment was acknowledged. This mode of proving payment is unobjectionable.

Second. He proved conversations with the plaintiff, who is the administrator of the intestate, in which payment of the notes sued upon was in effect admitted. This we regard as unobjectionable, although the plaintiff claims that it was improper under the ruling made in *Elwood v. Diefendorf* (5 Barb. 407). But that case merely holds, that the admissions of an executor or administrator cannot be received in evidence as against his co-executor or co-administrator or as against heirs and devisees. This decision is correct as far as it goes, and the cases cited in that decision give the reasons for the rule, but it is inapplicable here because the administrator is the sole party plaintiff, and his acts, admissions and declarations charge him, for he is personally responsible to the estate he represents for his conduct. Thus, in *Hill v. Buckmister* (5 Pick. 391), it was held that the admissions of an administrator, a party to the suit, may be given in evidence by the opposite party; and a like ruling was made in *Cobb v. Lunt* (4 Greenl. 503, 507). This evidence we hold was properly admitted. The third mode of proving payment, which the defendant adopted, is the objectionable one. The defendant was allowed to prove, under objection and exception, that the intestate had agreed to do certain contract work for the defendant for \$14,500, that he afterward added \$2,000 to the price, which was to come from a Mr. Taylor, who was advancing money on the property, and that this additional \$2,000 was to go to the defendant, or was to satisfy notes for that amount representing moneys loaned by the intestate in his life-time to the defendant.

The written contract between the intestate and the defendant called for \$16,500, and the oral testimony offered not only contradicted the writing, which in itself seems improper, but, what is more objectionable, the facts proved were not pleaded.

The plaintiff's counsel objected to the evidence on this

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specific ground; but, as before remarked, the objection was overruled under the exception. This evidence, especially under the pleadings, was improper, and may have influenced the jury to the prejudice of the plaintiff. At all events, this is the legal presumption (*Union Bank v. Mott*, 39 *Barb.* 180; *Warrell v. Parmelee*, 1 *N. Y.* 519; 18 *N. Y.* 546; 43 *Id.* 200; 47 *Id.* 188). The simple plea of payment can be supported only by proof of payment in money or its equivalent, and not by any special arrangement growing out of independent contracts not pleaded and called to the attention of the adverse party (*Morley v. Culverhill*, 7 *Mees. & W.* 171).

For this reason, if no other, the judgment appealed from must be reversed, and a new trial ordered, with costs to the appellant to abide the event.

HYATT, J., concurred.

City Court.

General Term—December, 1885.

BRIDGET LAVERTY, PLAINTIFF AND RESPONDENT,
against JAMES HOGAN, DEFENDANT AND
APPELLANT.

Liability of dog owners. To charge the owner of a domesticated animal for a bite or other misconduct, the owner must be shown to have knowledge that the animal is inclined to do the particular kind of mischief that has been done. *Scienter* must be alleged and proved. Dogs are not necessarily nuisances, and their owners are not, as a rule, liable for maintaining a nuisance. The reasons, stated.

Mad and vicious dogs may be killed by any one.

Lavery v. Hogan.

Appeal from a judgment entered on verdict of jury, in favor of the plaintiff.

Leeds & Morse, for defendant and appellant.

Chas. Blandy, for plaintiff and respondent.

MCADAM, Ch. J.—The action is to recover damages for the bite of a dog belonging to the defendant's son, who at the time was twenty years of age.

The theory on which the plaintiff sought to hold the defendant was, that while the dog was not his, he maintained it, because he allowed his son, who lived with him, to keep the dog about the premises. Assuming that the defendant is liable on this theory, he was certainly not liable in the absence of knowledge of the animal's wicked propensities. The dog was not of the species that are naturally savage and dangerous, and the defendant had the right to assume, in the absence of knowledge or notice to the contrary, that the animal was kind and of good character.

There is not a particle of evidence in the case bringing home to the defendant knowledge or notice of any propensity on the part of the dog to bite mankind.

Indeed, the request to charge, which the plaintiff's counsel asked the court to make, shows that he was conscious of the absence of such proof, for he requested the court "to charge that the vicious propensity of the dog can be gathered from surrounding circumstances, and that notice can be brought home to the defendant by effluxion of time. In other words, that it is not necessary that the defendant should know and see evidence of the viciousness of the dog, but if he might have known, seen it, or ought to have seen it if he exercised prudence and care, that that would give him notice." The court charged as requested, and the defendant's counsel excepted. This

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exception is fatal to the verdict which the plaintiff obtained.

The case of *McCarthy v. City of Syracuse* (46 N. Y. 194), cited to sustain the doctrine of implied notice, has no application whatever to a dog case. In that action, the city was sued for a defect in a street sewer, and it was held that no notice to the city was necessary, because it was the duty of the city to keep the sewers of the municipality in repair, and that this duty could not be discharged by waiting to be notified that they were out of order. But there is no duty imposed on the owner of a domesticated animal to ascertain its character before he becomes intimately acquainted with it. Its character, like that of an individual, is presumed to be good until the contrary is made known, and it is only after this knowledge is acquired that the owner is liable for keeping him. This law is not new; it will be found in all the books.

The case of *Feick v. Andel* (1 *City Ct. R. Supp.* 61) and *Quinn v. Knickerbocker Ice Co.* (*Daily Register*, November 18, 1885),* refer to many of the old and recent authorities bearing on the subject. The Maryland court of appeals, in a recent case (*Twigg v. Ryland*, *Wash. Law R.* November 1, 1884), re-affirmed the rule referred to in these words: "The onus is on the plaintiff to prove the knowledge of the owner or keeper, of the vicious propensities of the animal, if it be of a domestic nature, and to charge the defendant, he must be shown to have knowledge that the animal is inclined to do the particular kind of mischief that has been done."

The complaint, in an action for an injury by a domestic animal, should allege that the owner knew it was vicious (*Van Lewen v. Lyke*, 1 N. Y. 515; *Wheeler v. Brant*, 23 *Barb.* 324; *Fairchild v. Bentley*, 30 *Barb.* 147); and the complaint in the present action, in compliance with the requirement, alleges "that the defendant knew the dog

* See report of this case in note at p. 202.

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was vicious,"—a fact that must be proved, as well as alleged. That *scienter* must be alleged and proved, has not only been decided by the cases cited, but by the following, among others: *Rex v. Huggins*, 1 *Ld. Raym.* 1583; *Smith v. Causey*, 22 *Ala.* 568; *Vrooman v. Lawyer*, 13 *Johns.* 339; *Auchmuty v. Ham*, 1 *Den.* 495; 4 *Id.* 127; *Steele v. Smith*, 3 *E. D. Smith*, 321.

The more recent cases are cited in *Feick v. Andel* (*supra*). In *Thomas v. Morgan* (2 *Cromp. M. & R.* 496), the court held that evidence that the dog had bitten other animals, without proof that notice of the fact had been communicated to the defendant, was not sufficient to charge him, and that the jury could not infer *scienter* from the mere fact of former viciousness (*Wormley v. Gregg*, 65 *Ill.* 251). It is sufficient, however, if the dog was accustomed, from time to time, to bite people, under circumstances which would not provoke a dog of good temper (*Charlwood v. Greig* 3 *Carr. & K.* 46.) There is no rule which requires proof of any particular number of instances of unprovoked biting, in order to charge the owner of a dog with notice of his mischievous disposition. Satisfactory proof of a single instance of biting mankind previously to the case complained of, and of the defendant's knowledge thereof, is sufficient (*Arnold v. Norton*, 25 *Conn.* 92).

In *Tift v. Tift* (4 *Den.* 175), it was held that a father is not liable for injury occasioned by his minor daughter's willfully setting his dog upon a neighbor's swine, without proof that he knew that his dog was accustomed to do mischief.

In *Fleming v. Orr* (2 *Marq.* 14) Lord COCKBURN said, in reference to an action for dog worrying sheep, "Every dog is entitled to at least one worry;" and the rule would seem to be true in reference to its attacks on mankind. Every dog seems to be entitled to one bite, and every bull to one gore at a man, before its owner or keeper can be made liable for the results of such "playful" tricks on

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the part of his beasts (*Wood on Nuisance*, 802, note). The rule requiring proof of *scienter* does not apply, however, where mischief is done by dogs while trespassing upon the premises of another; for the law imputes the trespass of the animal to the owner (*Van Lewen v. Lyke*, 1 N. Y. 515; affirming 4 Den. 127; *Wells v. Howell*, 19 Johns. 385; *Stafford v. Ingersoll*, 3 Hill, 38).

The dog was not a trespasser in the present instance; he was on the premises of his owner, and was there by the permission of the janitor of the building as well. As to the policy or propriety of keeping dogs in tenements, and allowing them to play in the yards thereof, it is not necessary for us to advise, for so long as the owner is allowed to keep them there, they are not trespassers. This dog had been kept about this same tenement for a long time prior to the injury complained of; the occupants had the same means of ascertaining its character, that the defendant had, and yet no one seems to have complained of the animal's habits. The plaintiff resided in the same house with Mrs. Wood, a co-tenant of the defendant, and, if notice is to be imputed by mere acquaintance with the animal, it might with equal force be imputed to all the occupants of the house alike. The defendant did not own the dog—his son owned it, and kept it as a pet, and the defendant, like the other tenants in the house, tolerated it, although he no doubt could have removed it from the premises, if he had chosen to exercise the power. The plaintiff also contends that an idle dog is a nuisance, and that the defendant is liable on the theory of maintaining a nuisance. We cannot subscribe to this as a legal proposition. There are no doubt many people who believe that idle dogs are nuisances, but they are not necessarily so in a legal sense.

An idle man may be a vagrant, but it does not follow from this that all idle men are vagrants. Some idle dogs may be nuisances to the community, but it does not follow that all are. Dogs are the subject of ownership, and are

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sometimes valuable property ; and for any injury thereto, an action will lie (*Parker v. Mise*, 27 *Ala.* 480 ; *Woolf v. Chakler*, 31 *Conn.* 121 ; *State v. McDuffie*, 34 *N. H.* 523). They are also the subject of larceny (*People v. Maloney*, 1 *Park. Cr.* 598 ; *People v. Campbell*, 4 *Id.* 386) ; so that dogs are neither to be injured with impunity, nor stolen without subjecting the offender to the pains and penalties of the law.

Mad dogs, or dogs reasonably suspected of having been bitten by a rabid animal, are nuisances, and may be killed by any person, if at large, off from the owner's premises (*Wood on Nuisances*, § 765). Dogs accustomed to bark at night and to disturb the neighborhood by their noise, are nuisances, and may be killed by any person annoyed thereby (*Brill v. Flagler*, 23 *Wend.* 354). Where a dog is ferocious, and attacks persons, he may be killed as a nuisance (13 *Johns.* 312 ; 4 *Cow.* 351).

The proof does not bring the defendant's dog within either of these definitions, so that we find no legal significance in the suggestion that the defendant is liable for keeping and maintaining a nuisance. In short, the plaintiff's case must stand or fall by the old rule that, in order to recover, *scienter* must be alleged and proved, and, for the failure to give such proof and the error of the trial judge, in charging that *scienter* might be implied by the effluxion of time, the judgment must be reversed and a new trial ordered, with costs to the appellant to abide the event.

HALL, J., concurred.

QUINN v. KNICKERBOCKER ICE Co. (*Daily Reg.*, November 18, 1985), is as follows :

MCADAM, Ch. J.—The owner of creatures which, as a species, are harmless and domesticated, and are kept for convenience or use, such as cattle or horses, is not liable for injuries willfully committed by them, unless he is proved to have had notice of the inclination of the animal to commit such injuries (1 *N. Y.* 515 ; 8 *Barb.* 630 ; 30 *Id.*

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471). In other words, the owner of domesticated animals is not responsible for injuries they are not accustomed to do, and if an animal has acquired vicious propensities which animals of his species do not ordinarily have, the owner, before he can be made liable, must be shown to have had knowledge or notice of the fact. If he keeps the animal thereafter, he does so at his peril. *Scienter* is the gist of the action (See Feick v. Andel, 1 City Ct. R. Supp. 61).

In 1 *Hale's Pleas of the Crown*, 430, the law is thus concisely stated: "If a man have a beast, as a bull, cow, horse or dog, used to hurt people, if the owner know not of his quality, he is not punishable. But if the owner have notice of the quality of his beast, and it doth anybody hurt, he is chargeable with an action for it." In the present case, *scienter* was not proved, and for want of this proof the complaint was properly dismissed. *Scienter* may be imputed to a corporation as well as to an individual, but notice of the vicious propensity, in order to charge a corporation, must be communicated to one whose official position gives to the communication the legal effect of notice to the corporation, or to one whose duty requires him to inform the corporation and whose admissions would be competent evidence against it (33 L. J. Q. B. 310). There was no such notice to the corporation as is required to charge it with knowledge in the present case. In this respect, the plaintiff's proofs were defective.

It follows, therefore, that the motion for a new trial must be denied, but without costs.

Lavery v. Hogan was affirmed by the New York common pleas (1 *State Rep.* 84).

Dogs Trespassing.

When the animal is trespassing, the owner's knowledge of its vicious propensity is not necessary. The common law holds a man answerable for a trespass of his domestic animals; and as it is the natural and notorious propensity of many of such animals to rove, the owner is bound, at his peril, to confine them on his own land; and if they escape and commit a trespass on the lands of another (unless through defect of fences which the latter is bound to repair), the owner is liable, though he had no notice, in fact, of such propensity. The law deems the owner himself a trespasser for having permitted an animal to break into the inclosure of another. And plaintiff may recover for mischief done by the animal upon his close, by way of aggravation of the trespass, without proof that defend-

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ant had notice of his animal's vicious propensity (4 *Burr.* 2092 ; 2 *South.* 815 ; 7 *Watts & S.* 367 ; *Van Leaven v. Lyke*, 1 *N. Y.* 515 ; affirming 4 *Den.* 127 ; *Wells v. Howell*, 19 *Johns.* 385 ; *Stafford v. Ingersoll*, 3 *Hill*, 38 ; *Barto v. Stephan*, 19 *Week. Dig.* 164.

Dogs Worrying or Killing Sheep or Lambs.

§ 8 R. S. 7 ed. 2117, § 9, provides that the owner or possessor of any dog that shall kill or wound any sheep or lamb, shall be liable for the value of such sheep or lamb to the owner thereof, without proving notice to the owner or possessor of such dog, or knowledge by him, that his dog was mischievous or disposed to kill sheep.

Vicious Animals.

One knowingly keeping on his premises a ferocious dog, without giving notice, and in such a way he will worry ordinary trespassers in the day time is liable for an injury inflicted by the dog, although upon a trespasser (*Loomis v. Terry*, 17 *Wend.* 496; and see *Buckley v. Leonard*, 4 *Den.* 500). Even a notice to "Beware of the Dog" will not protect the owner, unless it was called to the notice of the injured party (*Sawyer v. Jackson*, 5 *N. Y. Leg. Obs.* 380). If the dog is kept chained the owner is as a rule not liable (*Logue v. Link*, 4 *E. D. Smith*, 63). A dog which is accustomed to bite other dogs, without being incited to do so, is a vicious animal, and the owner should kill him or confine him as soon as he has knowledge of his dangerous habits (*Wheeler v. Brant*, 23 *Barb.* 324).

Letting Out Vicious Horse.

One letting a vicious horse to hire is bound to inform the hirer of his vices (*Campbell v. Page*, 67 *Barb.* 118.)

Imputing Knowledge to Owner.

In an action for injuries to a horse kicked by the defendant's mule,—*Held*, that a hostler in the defendant's employ, apparently charged with the duty of feeding and taking care of their teams when they came to the stable, had not such a duty imposed upon him by the defendants as to make them chargeable with his knowledge of the viciousness of the mule (*Shaver v. New York & Lake C. Co.*, 31 *Hun*, 55).

Where One Dog Kills Another.

If plaintiff's dog provoked the quarrel, and caused the fight, defendant, as owner of the other dog, cannot be held responsible.

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(*Wiley v. Slater*, 22 *Barb.* 506); but the owner of a vicious dog attacking another without provocation is liable (*Wheeler v. Brant*, 23 *Barb.* 324).

Who Liable as Owner.

A person in possession of a dog, or allowing him to remain about his house for twenty days, is deemed to be the owner thereof (1 *R. S.* 706, § 20); but where the dog belongs to a hired laborer who follows him daily to his work, the employer is not liable (*Auchmuty v. Ham*, 1 *Den.* 495).

Right to Kill Dog.

The owner of land is not justified in killing domestic animals found trespassing (*Mathews v. Fiestel*, 2 *E. D. Smith*, 90); but any person may kill a vicious dog permitted to run at large (*Putnam v. Payne*, 13 *Johns.* 312; *Maxwell v. Palmerton*, 21 *Wend.* 700; *Dunlap v. Snyder*, 17 *Barb.* 561); or a dog running at large who has lately been bitten by a mad dog (*Putnam v. Payne*, *supra*); or a dog in the habit of flying at persons in the public street (*People v. Board of Police*, 15 *Abb. Pr.* 167; 24 *How. Pr.* 481); or a dog on the land of the defendant killing fowl (*Leonard v. Wilkins*, 9 *Johns.* 233); or disturbing the peace (*Brill v. Flagler*, 23 *Wend.* 354). If two dogs are fighting and cannot be separated, the one making the attack may be killed if necessary to separate them (*Boecher v. Lutz*, 20 *Week. Dig.* 484).

IN *BOECHER v. LUTZ*, *New York Common Pleas, General Term*, the following rule was laid down:

VAN HOSSEN J.—If the dog was killed whilst attacking the wife of the defendant, the plaintiff has no right of action; but there was a conflict of testimony upon that point, and the justice must have found that the dog did not attempt to bite the defendant's wife.

The defense of a human being is not the only circumstance that will justify the killing of the dog. The owner of an animal may lawfully kill a dog if such killing be necessary to save the animal from death or from serious injury.

The killing cannot be done to avenge an attack that has ceased, and can only be justified when done to avert impending danger of death or serious injury of the animal (*Moore v. Pearson* 6 *Jones* [N. C.] 293; *Williams v. Dixon*, 65 *N. C.* 416).

If two dogs are fighting, and cannot otherwise be separated, the dog that made the attack may lawfully be killed. *Wright v. Ramscott*, *Saunders*, 84).

To constitute a justification, it must appear, however, that the kill-

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ing was necessary, and that the dog that was killed was the aggressor. In this case, the defendant's dog was muzzled and thereby incapacitated for defense. The plaintiff's dog was the aggressor, and it made a second attack upon the defendant's dog after having once been driven away. The defendant then seized the plaintiff's dog, whirled it by its hind legs in the air, and then dashed its brains out against the stones of the street. Was it necessary thus to kill the dog, in order to save the other dog from serious injury, or did the defendant unnecessarily destroy it?

The testimony upon the point is conflicting, and there is some evidence that the killing was an act of vengeance, but a finding that the killing was necessary could not be at all reasonable (*Leonard v. Wilkins*, 9 *Johns*. 533; *Hinkley v. Emerson*, 4 *Cow*. 351).

But the justice erred in excluding evidence that the dog was accustomed to bite mankind. He said that he would not receive evidence that the dog was ferocious, unless the acts of ferocity were done within a year prior to the trial. There is no such limit known to the law.

Acts of ferocity done at any time may be shown, but they will not make out a defense if it appears that for a long time the dog has ceased to be dangerous. If, however, it is proved that a dog is accustomed to bite mankind, that it was upon the highway, unmuzzled, and in a condition to do injury to human beings, the killing of it is lawful (*Stewart v. Palmerston*, 21 *Wend*. 407; *Putnam v. Payne*, 13 *Johns*. 312). We do not estimate what the decision of this case ought to be, but leave it to the justice to apply the law to the facts.

For errors in excluding testimony we think that there should be a new trial, but we give no costs of appeal.

DALY, J., concurred.

Rights of Owners of Strays.

The owner of an animal seized for straying on the highway must establish his right to damages in the special proceeding provided by the statute; he cannot maintain action (see *Code Civ. Pro.* §§ 3096 3108; and see sections 3082 to 3115; *Willard v. Severance*, 1 *How. Pr. N. S.* 521).

Joint Wrongdoers.

When dogs kill sheep or do other damage jointly, the owner of each is liable only for the damage done by his own dog, and a joint action will not lie against them (*Carroll v. Wheeler*, 4 *Thomp. & C.* 31).

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Fellow Servants.

The doctrine of non-liability for acts of a fellow servant does not ordinarily apply to a dog case (*Muller v. McKesson*, 73 N. Y. 195).

Miscellaneous Notes.

See notes to *Feick v. Andel*, *Supplement to Vol. 1*, p. 64.

We take the following, in relation to the liability of an owner for damages done by his dog, from the *Montreal Legal News*. Our cotemporary says:

"The law concerning dogs and dog bites, in England, has given rise to numerous complaints, and these appear to be not without foundation. At the hearing of a case in the Bolton county court recently, damages were claimed from a defendant on account of his dog having bitten the plaintiff. The evidence proved that the dog, a huge St. Bernard, rushed at the plaintiff, a little boy, knocked him down, 'tore a large piece out of his right cheek, disfiguring him for life, and shook him as a terrier would a rat.' The judge, however, found himself unable to award damages to the plaintiff, because the law requires that the dog must be proved, not only to have previously shown vicious propensities, but to have, to the knowledge of its master, been accustomed to bite mankind. The judge declared that 'he wished it to go forth to the world that the law relating to dog bites as it stands is barbarous.'

"In *State v. McDermott*, the New Jersey supreme court holds that a person bitten by a dog may recover damages from the owner, upon evidence that the dog, with the knowledge of the owner, had a mischievous tendency to bite, whether in anger or not. In either case, the person bitten would suffer injury. A mischievous propensity, from which injury is the natural result. In the case of *Hudson v. Roberts*, 6 *Exch.* 699, it appears that the plaintiff was walking in the street wearing a red handkerchief. The bull of defendant,—ordinarily gentle and quiet, and not known to have gored any person previously,—was being driven along the street when he attacked and gored the plaintiff. The defendant said that the red handkerchief did it, and that he knew the bull would run at anything red. The plaintiff recovered. The bull had no hostile feeling against the man he injured, and no disposition to gore mankind, yet, because of his mischievous propensity to rush at a red object, of which his owner knew, it was held that when he caused injury to the plaintiff, through that propensity, his owner should pay damages. A

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domesticated bear may hug a man until his ribs be broken. This may be the mode adopted by the animal to manifest his affection; yet, if he had on other occasions previously shown his affection in that way, causing injury, and his owner knew of such propensity, the owner would have to pay damages caused by breaking the man's ribs. It is true that the bear is classed with animals *feræ naturæ*, and the presumption, in such case, would be that although domesticated, the animal had relapsed into his wild habits; yet although the presumption on the question of *scienter* would be against the owner, he might be able to prove that the habit of embracing persons did not proceed from the savage nature of the bear, but, under the influence of civilization, from a cultivated affection. But this proof would be held to be mischievous, because hurtful to those who were the object of the bear's affection.

"In the case of *Oaks v. Spaulding*, 40 *Fr.* 347, it appeared that Mrs. Oaks was driving cows home from pasture, when the ram of Spaulding attacked and injured her. It was shown that the ram had a propensity to butt mankind, and that the defendant knew it, but it did not appear whether the previous buttings by the ram proceeded from an ugly disposition, or from the exuberance of a playful spirit; yet it was held that the defendant was liable. It did not cure the hurt nor assuage the pain of the woman to be told that the ram, when he butted her, was only in one of his accustomed sportive moods. It might have been fun for the ram, but it was hurtful to Mrs. Oaks. It was a mischievous propensity, whether proceeding from ugliness of temper or from good nature, which, if known to the owner of the ram, made him liable for damages resulting from such propensity. There is no doubt, that in cases of animals not naturally inclined to do mischief, a previous mischievous propensity must be shown, and the *scienter* clearly established. The gist of the action is, not the keeping of the animal, but the keeping with knowledge of the mischievous propensity, whether proceeding from a savage disposition or not. The conclusion is, that the plaintiff below, having shown by his proof that on several previous occasions the dog in question had bitten various persons on the hand, with knowledge of the defendant, he was entitled to recover, even if the habit did not proceed from a ferocious nature, but was the result of a mischievous propensity."

Injuries Done by Dog to Horse on Highway.

The following decision was filed by Judge THORNTON in the Sullivan county court, September, 1886, in the case of JOHN R. VAN NESS against JOSEPH DESHEIMER:

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"The return shows that on July 11, 1885, the plaintiff's wife was driving a pair of mules, drawing a carryall wagon, through the town of Tusten, and that, while passing the defendant's house, the defendant's dog came out of the yard into the highway and made an attack on the offside mule, frightening the team, rendering it unmanageable, and causing it to run the wagon into the fence of a Mr. Stanton, doing \$10 damage to the wagon. The defense interposed was a general denial, and, upon the trial, the justice rendered a judgment in favor of the plaintiff for \$10 and costs, from which the defendant has taken the present appeal.

"THORNTON, Co. J.—In order to make the owner of a dog liable in an action at the suit of a person who has been injured by such dog, it must be averred and proved that the defendant had knowledge of its mischievous propensities. The gist of the action is the keeping of the dog after knowledge of its propensity to do mischief, and no action is maintainable without proof of such knowledge (*Lavery v. Hogan*, 1 *N. Y. State Rep.* 84). The reason of the law is that a dog is a domesticated animal, and the defendant had a legal right to keep one about his premises, having the right to assume that the dog would behave as a good dog should; but after he has committed the impropriety of biting, and the master is informed of the animal's vicious propensity, he keeps the dog thereafter at his peril. A person has as much right to keep a dog as he has to keep a cat, a cow, a horse, or other domesticated quadruped, although their habits differ. The cat keeps mostly in-doors, while the dog is known to be a great pedestrian, fond of out-door exercise; and there is no law which prevents the dog from entering upon and using the public highways whenever his inclinations or necessities require it to use the same. There are provisions of the statute regulating estrays, which forbid "cattle, horses, sheep, swine or goats," from running at large or pasturing on the highways of the State (*Cowen's Tr. Kingsley's* ed. § 533); but I find no such provision in regard to dogs, which seem to have the liberties of the highways. In this view of the law, the defendant's dog was not a trespasser when he left the defendant's yard and entered upon the highway, for he had the right to go there.

"This leads to the logical conclusion that the defendant is not liable for what the dog did on the highway, in the absence of proof that he, defendant, knew that his dog was accustomed to attack man or beasts, who were passing his premises; and there is no evidence establishing such knowledge.

"The legislature has dispensed with proof of *scienter*, where the

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injury is done by dogs to 'sheep or lamb' (3 R. S. 7 ed. 2117, § 9). The fact that the legislature dispensed with this proof as to sheep or lamb, is indicative of an intention to leave attacks upon other animals or upon human beings to be governed by the common law rule in regard to *scienter*.

"In *Dickson v. McCoy* (39 N. Y. 400), the defendant allowed his horse to go unattended through the streets of Troy, and it kicked the plaintiff in the face. The horse was accustomed to run and play in the streets while unattended, and the court held that while this was no evidence of a mischievous disposition, it was one liable to produce mischievous results. GROVER, J., said in that case: 'The owner is not liable for permitting his domesticated animal to be at large when he has no reason to apprehend that any injury to others will result therefrom. If he has such reason, he is liable. In that case, the defendant had notice, that his horse, when at large, was in the habit of running and kicking upon the sidewalk. These acts he must have known were dangerous to others;' and it was in consequence of this known danger that the judgment against the owner of the guilty horse was affirmed.

"In the present case, the defendant had the right to suppose that his dog would behave itself while on the public highway, for there is no proof that he had ever been guilty of any previous misconduct, to the defendant's knowledge. The defendant insisted in the court below that there was no proof of *scienter*, and that such proof was necessary to sustain the action, and that without it the action must fail. He moved to dismiss the complaint upon this ground, but the motion was denied under exception.

"This evidence was necessary to warrant the judgment of the justice, and, for the want of it, his judgment must be reversed, with costs."

Criticism.

The London Truth (of November 12, 1885), in an editorial comment on a recent decision, said: "I have never understood why, if my neighbor's dog bites me, I should be unable to obtain satisfaction until I have shown that the dog had previously bitten some one else. Such, however, is the law on this important subject."

The reason of the law is that the neighbor, knowing nothing to the contrary, has the right to assume that the dog will behave as a good dog should, but, after he has committed the impropriety of biting the adjoining tenant, and the master is notified of the animal's vicious propensity, he keeps the dog thereafter at his peril.

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City Court.

*General Term—December, 1885.*HUDSON KITCHELL *against* GEORGE BECK.

Damages for trespass. The law guards with great jealousy and watchfulness the peaceable possession by every man of his dwelling-house, and enables all who have been disturbed in the enjoyment thereof to recover substantial damages from every willful and intentional intruder, though no actual pecuniary damage can be proved to have been done in point of fact either to property or the person.

If a question put to a witness is capable of a construction which makes it competent, a general objection to it will not be regarded, although it is also capable of a construction which may render it incompetent. The specific ground of objection must be stated, to be available.

The plaintiff, a carpenter, in March, 1884, bought a carpet from the defendant for \$38, on the installment plan. After the carpet had been delivered and one installment paid thereon, the defendant sent a chattel mortgage for the plaintiff to sign. As the plaintiff was not home, it was signed by his daughter, without his authority. The subsequent installments not being promptly paid, the defendant sent three men, tore the carpet from the floor, and carried it away during the plaintiff's absence from his house. The plaintiff subsequently brought suit in the city court for trespass. Upon the trial before Judge BROWNE, the jury awarded the plaintiff \$500 damages, to which was added the court expenses. From this judgment the defendant appealed.

H. B. Weschman, for appellant.

G. R. Hawes, for respondent.

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MCADAM, Ch. J.—The jury, by their verdict, have found that the carpet was sold to the plaintiff; that the chattel mortgage signed by the daughter in the name of the wife was executed without his authority, and that the entry by the defendant's employees into the plaintiff's dwelling, by the defendant's direction, was a trespass from the beginning; from which it follows, as matter of law, that he was liable for it and all the consequences flowing from it. The plaintiff lived with and supported his wife and family, and if either his wife or children were ill at the time of the trespass, the plaintiff had the right to prove the fact, not by way of special damages, for none were alleged, but to characterize the nature and extent of the trespass upon his premises. His wife and children were under his care and protection, and while he probably could not recover for any personal injury to them, the fact that they were ill was a circumstance he was not bound to withhold from the jury, for the person who commits or directs the commission of a trespass is supposed to have contemplated the consequences of his acts. But there are cases in which the husband may recover for injuries to his wife. Thus, in *Brooks v. Schwerin* (54 N. Y. 343), the court of appeals held, that notwithstanding the various acts in regard to married women, the services of the wife in the household belong to the husband, and, so far as any injury to her disables her from performing such services, the loss is his, and that he, and not she, can recover therefor (See also 49 N. Y. 477). Under the circumstances, the question put to the plaintiff's wife, as to the state of her health at the time of the trespass, was not altogether improper, for its tendency was rather to characterize the nature of the trespass than to prove a personal injury to her. The specific ground of objection to the question was not stated, and the rule is, that if a question is put, capable of a construction which makes it competent, a general objection will not be regarded, although it is also capable of a construction which may render it incompe-

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tent (*Briant v. Tremain*, 49 *N. Y.* 96). In other words, to make the exception available, it must appear that the precise question intended to be raised was brought to the attention of the court (*Welsh v. Washington*, 32 *N. Y.* 427; *Lavin v. Hand*, 42 *N. Y.* 251; *Shaw v. Smith*, 3 *Keyes*, 316; *Amidon v. Ingersoll*, 34 *Hun*, 185; *Daly v. Byrne*, 77 *N. Y.* 182; *Ward v. Kirkpatrick*, 85 *Id.* 413; *Quimby v. Strauss*, 90 *Id.* 664; *Bergman v. Jones*, 94 *Id.* 51). If the objection had been specifically stated, the form of the question could have been changed or the plaintiff might have acquiesced in the incorrectness of the evidence, and withdrawn the question entirely. If, for example, the defendant meant to contend that no special damages were alleged, the trial judge, on having his attention called to the fact, might have sustained the objection or allowed an amendment of the complaint in that regard. We think, however, that the question put was not altogether improper, and worked no injury to the defendant.

The answer to the question was that her health was not very strong. She added, however, "This made me sick; nervous excitement added to my sickness and humiliation." But this answer was not responsive to the question which was objected to by the defendant, and might have been stricken out on that ground if an application to strike out had been made. If, however, the sickness spoken of prevented the wife from attending to her household duties, the right of action therefor, under the case of *Brooks v. Schwerin*, *supra*, belonged to the husband, and formed a proper element of damage, if he had claimed it in his complaint, so that the rule requiring objections to questions to be specific applies with peculiar force to the one under consideration. The jury were not instructed to allow damages for any personal injury to the wife, but for the injury to the plaintiff's property, and for the defendant's disregard of the plaintiff's right to the enjoyment of his house and home. This was in effect telling the jury

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that they might allow the plaintiff for the injury to his property and exemplary damages for the invasion of his home, and the humiliation consequent upon it.

We think this was proper (*Garrison v. Smith*, 2 *N. Y. Leg. Obs.* 218). *Addison on Torts*, 3 ed. at page 300, says with respect to trespasses like the present: "The law guards with great jealousy and watchfulness the peaceable possession by every man of his dwelling-house, and enables all who have been disturbed in the enjoyment thereof to recover substantial damages from every willful and intentional intruder, though no actual pecuniary damage can be proved to have been done in point of fact either to property or the person. Rights of action of this sort are given, observes Lord DENMAN, in respect to the immediate and present violation of the possession of the plaintiff, independently of his right of property; they are an extension of that right of protection which the law throws around the person, and substantial damages may be recovered in respect of such rights, though no loss or diminution in the value of the property may have occurred."

In the present case the entry was without right, and was unlawful, and, whether malicious or otherwise, it was certainly intentional, and the injury as great as if malice had been associated with the intent with which the trespass was committed. The damages recoverable in a case like the present must, in the nature of things, rest largely in the discretion of the jury, and while they awarded substantial damages,—to wit, \$500,—we cannot say that they are so excessive as to require a new trial or a reassessment.

For these reasons, the judgment appealed from must be affirmed, with costs.

HYATT and HALL, JJ., concurred.

Reiners v. Davis.

City Court.

General Term—December, 1885.

JOHN G. R. REINERS, PLAINTIFF AND APPELLANT, *against*
GEORGE K. DAVIS, ET AL., DEFENDANTS AND
RESPONDENTS.

Bank checks. The drawer of a bank check is regarded as the principal debtor, and negligence of the holder in presenting it does not absolutely discharge him from liability, unless he has suffered some injury from the neglect. Burden of proof. Waiver.

Appeal from a judgment entered on the dismissal of the complaint at the trial.

Schatz & DeWitt, for plaintiff and appellant.

Wm. H. King, for defendants and respondents.

MOADAM, Ch. J.—The action is on a bank check drawn by the defendant, Davis, to the order of and indorsed by the defendant, Fuller, and by him delivered to the plaintiff. It is dated May 6, 1884, and is for \$327.66. The defendants answered separately. Davis claimed that he made the check to accommodate Fuller. Fuller pleaded a counter-claim for \$275, but subsequently withdrew it, and both defendants rested their defense on the delay in presenting the check for payment, and in serving the necessary notices of dishonor. For this apparent neglect, the complaint was dismissed as to both defendants, and from the judgment entered on the dismissal, the present appeal is taken. The check, as before suggested, was made May 6, 1884, and it was presented for payment September 21, 1885, a delay of over sixteen months.

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We will first consider the effect of such delay upon the parties to a bank check, and then refer to the evidence relied upon to excuse the apparent neglect. In the first place, there is an important distinction as to the extent of the legal consequences of neglect and delay in presentment and notice, between bills of exchange and checks. It is true that the indorsers of such instruments stand on the same footing in reference to the effect of delay or failure in making presentment or giving notice. They are absolutely and entirely discharged, if presentment be not made within a reasonable time, and due notice given.

But the drawer of a bill stands upon a different footing from the drawer of a check. In the case of a bill of exchange, negligence in respect to presentment or notice, absolutely discharges the drawer. But the drawer of a check is regarded as the principal debtor, and the check purports to be made upon a fund deposited to meet it, and negligence of the holder, in not making due presentment, or not giving him notice of the dishonor, does not absolutely discharge him from liability, unless he has suffered some loss or injury from such negligence, and then only to the extent of such loss or injury. He is at most entitled only to such presentment and notice as will save him from loss. Were it otherwise, the drawer would profit by a neglect which could do him no injury.

These principles, laid down by Daniel in his work on *Negotiable Instruments*, § 1587, are sustained by other elementary writers (*Byles on Bills*, marg. p. 20; *Edwards on Bills*, §§ 549, 551), and by the courts in *Murray v. Judah*, 6 Cow. 486; *Little v. Phoenix Bank*, 2 Hill, 425; *Bell v. Alexander*, 21 Gratt. 6; *Emery v. Hobson*, 63 Maine, 32, and other cases.

The next question to be considered is as to the burden of proof. The present action being on the check, the plaintiff was bound to prove that the drawer was not injured by the delay (*Little v. Phoenix Bank*, *supra*). If the action had been brought on the precedent debt, the

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onus of proving loss would have been shifted on the drawer (*Bradford v. Fox*, 38 N. Y. 289). The plaintiff, by way of excusing the delay, testified upon the trial: "I had a conversation with Mr. Fuller about holding this check, and afterwards with Mr. Davis; the first conversation in regard to this check I had with Mr. Davis was about July, 1885; at that time I requested payment of another note of Mr. Davis which I held; the check I have here now was a matter of Mr. Fuller's; I told Davis I had his obligation, and he stated, 'Give me time until I collect the money of Mr. Fuller.'" Davis did not express surprise nor allege injury by delay, but asked further time. This testimony as to a fact peculiarly within the knowledge of Davis, was evidence from which the jury would have been authorized to infer, in the absence of explanation or contradictory proof, that no injury had resulted to him from the delay. The plaintiff also testified that Fuller, the indorser, met him and asked if the check had been deposited, and when the plaintiff answered in the negative, Fuller said: "You hold it and you can draw interest upon it."

This testimony proved that Davis wanted the plaintiff to wait until Davis collected the money from Fuller, and Fuller wanted the plaintiff to wait, and, as an inducing argument, said that the check drew interest. This proof was uncontradicted, and, in our judgment, negated the idea of loss or injury, and amounted to a waiver of an earlier presentation and notice (*Sheldon v. Horton*, 53 Barb. 23; affirmed, 43 N. Y. 93). This conversation agrees with the answer of Davis, alleging that he drew the check to accommodate Fuller, for it implies that Fuller, and not Davis, should provide for its payment. Upon the entire proofs, we think the plaintiff made out a *prima facie* case, and that it was error in the trial judge dismissing the complaint.

For these reasons, the judgment appealed from will

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be reversed, and a new trial ordered, with costs to the appellant to abide the event.

HALL, J., concurred.

City Court.

Trial Term—January, 1886.

BRIDGET MULCAHY *against* FRANCIS C. DEVLIN,
IMPLEADED, ETC.

A deposit was made with the Church of Alphonsus to the credit of Bridget or Ellen Mulcahy. On such a deposit the church might have paid the money to either depositor in the absence of notice to the contrary; but after notice from one of the depositors not to pay the other, the case was a proper one for interpleader, and if the church had paid the one after notice from the other not to pay, the one giving the notice might have maintained an action to recover the proportion of the deposit belonging to her.

In this case, the defendant, as attorney for one of the depositors, drew the entire fund, and while it was in his hands, the other depositor demanded it as belonging to her, notwithstanding which notice he paid it to his client. *Held*, that under such circumstances the attorney was liable to the depositor giving the notice for the portion of the fund belonging to her.

Motion for a new trial on the minutes.

Jacob A. Gross, for motion.

A. Kling, opposed.

McADAM, Ch. J.—The money withdrawn from the Church of Alphonsus was deposited to the credit of Bridget or Ellen Mulcahy. On such a deposit the church

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might have paid the money to either depositor, in the absence of notice to the contrary; but after notice from one of the depositors not to pay the other, the case presented a proper one for interpleader, and if the church had paid the one after notice from the other not to pay, the one giving the notice might, notwithstanding the payment, have maintained an action against the church for the amount of the deposit which belonged to her (*Mulcahy v. Emigrant Industrial Savings Bank*, 89 N. Y. 435). No notice not to pay was given to the church, and it paid the entire money on deposit over to the defendant Devlin as the attorney of Ellen Mulcahy, one of the depositors, who counted it over to his client, but it was immediately thereafter returned to him and remained with him for some weeks thereafter. The form of the deposit was such as to carry with it notice that each depositor might have some interest in the fund, the extent of which was as yet undetermined. While the money was in the hands of the defendant charged with this constructive notice, the plaintiff notified the defendant that the fund belonged to her, and that she demanded its payment. The defendant, notwithstanding this notice, deducted his fee and paid over the balance of the money to his client. There have been three trials of this action. Upon the first trial, the verdict was obtained by the plaintiff against Ellen Mulcahy and the defendant Devlin, for the amount of the fund withdrawn, upon the ground that the money, to the extent of \$400 and interest, belonged to the plaintiff, and that the defendants had wrongfully misappropriated it. Upon appeal the judgment as to the defendant Ellen Mulcahy was affirmed, but as to the defendant Devlin it was reversed on the ground that he was not liable for the wrong. The judgment against Ellen Mulcahy still remains of force unreversed, and its effect as an adjudication conclusive as to the ownership of the fund will be discussed further on. Upon the new trial ordered as to the defendant Devlin, the complaint was dismissed on the ground of non-liability for the wrong.

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The general term of the city court affirmed the judgment entered on the dismissal, but on further appeal to the court of common pleas, that court at general term reversed the adjudications made below, upon the ground, as near as can be ascertained, that the question of notice to the defendant Devlin not to pay over, while the money was in his possession, ought to have been submitted to the jury, to the end presumably that if he paid over the money after notice of the plaintiff's claim he was liable to her in the present form of action for the possession of the money belonging to her which he disposed of, in the same manner and to the same extent as if the money had not been paid over. I suppose this was upon the theory that, having become possessed of the plaintiff's property, that after notice and demand he became liable to her for it, the same as he would have been if he had received a horse or any article of merchandise to which she had title. I have had to suppose some of these things, because the court of common pleas, on reversing the general term of the city court, evidently thought the questions involved were so plain that it was not necessary to put the grounds of reversal in the form of a written opinion which might have been obtained at once, from the files of that court, for the guidance of the trial judge upon the new trial which it directed. If I am correct in assuming that the court of common pleas held that, if after due notice to the defendant, that the fund belonged to the plaintiff, and after proper demand by the latter he refused to pay her, but delivered the money to his client, that he was liable in the present form of action for the portion of the money belonging to the plaintiff, there is but little left to consider on this motion.

The questions of notice and demand were submitted to the jury, who found for the plaintiff, so that the questions which the common pleas held should have been submitted to the jury on the former trial, were properly submitted on the trial just had, and the verdict in favor of the plaintiff effectually disposes of the case, unless error

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was committed in holding that the unreversed adjudication between the plaintiff and Ellen Mulcahy, the rival claimants to the fund, was conclusive, as to the plaintiff's title, on the theory that the defendant, as the attorney and agent of Ellen Mulcahy, was privy thereto, and therefore bound by it.

To render a former adjudication a bar, it must appear that the litigation was between the same persons or their privies. By privies are meant persons who are represented by the parties, and who claim under them or in privity with them, who have mutual or successive relationship to the same right or thing (*Goddard v. Benson*, 15 *Abb. Pr.* 191).

The question litigated was whether the fund belonged to Bridget or Ellen Mulcahy, and the judgment in the action between them determining that the fund belonged to the plaintiff, forever settled that controversy. The action was litigated, the defendant had notice of it; in fact he was a party to the same action, appeared upon the trial, took part in it, and, while the adjudication was reversed as to him, such reversal in no way impaired the question of title which the adjudication established, and which has been left in full force and effect. Suppose the jury had found, in favor of Ellen Mulcahy, that the fund belonged to her, could Bridget, after that adjudication, have maintained an action against Ellen's attorney (the defendant Devlin) for paying over to her the money? I think not. Devlin might have pleaded the adjudication in bar of such an action, and it would have been conclusive.

The judgment was a sort of adjudication *in rem*, and conclusive not only between the parties, but against any one claiming the same fund as agent of either of the contestants.

If Ellen Mulcahy had no right to withhold the fund from the plaintiff, the defendant could not, as the agent of Ellen, assert greater right in respect thereto than his

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principal (see *Tasker v. O'Brien*, 68 N. Y. 447; *Craig v. Ward*, 36 Barb. 377; *Greene v. Clarke*, 12 N. Y. 343; 6 *Wait's Actions* (d. 801). The defendant ought to have followed out the course pointed out in *Mulcahy v. Emigrant Industrial Savings Bank*, *supra*. He should have moved for an interpleader, and allowed Bridget and Ellen to have settled the question of title in an action between themselves, and he might have relieved himself from all liability by this simple procedure, accompanied by the deposit of the fund in court.

The notice given by the plaintiff, followed by a demand for the money, practically impounded the fund in his hands, and, as the payment over to Ellen Mulcahy after notice and demand has been held to be no defense, the fund is in legal effect in his hands still, with this difference in the situation of the rival claimants: the defendant could not then safely determine which of them to pay, but the adjudication since made has effectually removed this doubt, and the plaintiff, by the judgment of the court, has been adjudged to be entitled to \$400 and interest, and for this amount the jury on the present trial awarded a judgment against the defendant Devlin. The identity of the fund having been established and having remained intact, the defendant's refusal to pay it over to the plaintiff gave the plaintiff the cause of action on which she has recovered. The cases relied upon by the defendant (*Wood v. Jackson*, 8 Wend. 10; *Hall v. Andrews*, 65 N. Y. 572; *Smith v. Trowbridge*, 77 N. Y. 414) simply declare the existence of a general rule that where a judgment is reversed it ceases to operate as an estoppel, as the reversal destroys its value and legal effect. If the judgment as to Ellen Mulcahy had been reversed, these decisions would have become applicable. As it is unreversed and in full force and virtue, they have no application whatever to the question presented here.

Upon the entire case, the maxim *interest reipublice ut sit finis litium* applies; the question of title was conclusively

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adjudicated upon the former trial; the parties directly interested in that question are concluded by the result which remains unreversed and unimpaired; the questions necessary to connect the defendant with the wrong of which the plaintiff complains, have been passed upon by the jury adversely to the defendant, and their verdict on the disputed facts is conclusive. No error was committed in admitting the former record in evidence, or in holding the adjudication to be conclusive on the subject of title to the fund.

The motion for a new trial must, therefore, be denied.

Joint Deposits.

Where money is deposited in the joint names of two, either may draw the money (*Platt v. Crubb*, 41 *Hun*, 447).

Husband and Wife.

Where a deposit is made in the joint names of husband and wife, it inures to both, and the whole goes to the survivor (*Platt v. Crubb*, *supra*). This old rule of law is still prevalent in this State (*Bertles v. Numan*, 92 *N. Y.* 152). Where a married woman, possessed of separate personal property, dies without having made any disposition of it in her life-time, or by way of testamentary appointment, the title thereto vests in her surviving husband, and cannot be affected by the granting of administration upon her estate to any other person (*Ransom v. Nichols*, 22 *N. Y.* 110; *Ryder v. Hulse*, 24 *Id.* 372; *Barnes v. Underwood*, 47 *Id.* 351).

City Court.

Trial Term—January, 1886.

**THE SINGER & GOODRICH CO. against HARDY,
AS ASSIGNEE, ETC.**

A debt contracted by an assignee, though for the benefit of the

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assigned estate, charges the assignee individually, and the action therefor should be against him individually.

When amendment allowed, and on what terms.

MCADAM, Ch. J.—The debt, although contracted for the benefit of the assigned estate, charged the defendant individually (20 *Hun.*, 114; 47 *N. Y.* 363); and the action, both by its title and the allegations of the complaint, appears to be against the defendant in his official capacity. The defendant concedes that individually he is chargeable with the debt, and the technical objection that the action was improperly brought against him in his representative capacity, is practically his only defense.

Under the circumstances, and in furtherance of justice (for technical pleas are not favored), an amendment of the pleadings will be allowed, so as to make the action one against the defendant individually; on condition, however, that the plaintiff waives his taxable costs and disbursements. The question came up on demurrer in 47 *N. Y.* 363, and the court (at p. 367) said: "The action cannot be converted into one against the defendants individually by the judgment of the court on the demurrer," but concedes that the objection might have been obviated by amendment, if the question had come up in proper form. The amendment may be made at the trial. (*Coxe*, § 540), and the terms imposed as a condition remove all possible claim that the amendment prejudices any legal rights of the defendant.

The plaintiff (upon filing the stipulation) is entitled to a verdict for \$420.23, the amount claimed, and interest, but under the stipulation, without costs.

Personal Liability of Representatives.

An executor, administrator or general assignee, is individually responsible for the debts which he contracts in the management of his estate. (*Wilcox v. Smith*, 26 *Barb.* 316; *Bowman v. Tallman*, 2 *Robt.* 385; *Mygatt v. Wilcox*, 1 *Lans.* 55; 7 *Weekly Dig.* 390; 34 *Legal Intelligence*, 382; *Moran v. Risley*, 1 *City Court R.* 229; *Ferrin v. Myrick*, 41 *N. Y.* 315; *Schmittler v. Simon*, 101 *N. Y.* 554).

McGuire v. Keeler.

City Court.*Trial Term—January, 1886.***ELIZABETH McGUIRE *against* JENNIE M. KEELER****ET AL.**

The legatees under a will consented that the executrix have the use of her rooms without rent. Upon the accounting before the surrogate, he held the agreement invalid, and charged the executrix with rent. In an action on the agreement by the executrix against the legatees to recover damages. *Held*, that the adjudication by the surrogate was a bar to the action.

Trial by the court without a jury.

Samuel J. Adams, for plaintiff.

J. J. Brady and *E. K. Sackett*, for defendants.

McADAM, Ch. J.—Eleanor Mulligan departed this life at the city of New York, December 18, 1881, leaving a will in and by which the plaintiff and Jennie M. Keeler, one of the defendants, were named as executrices. They subsequently qualified and entered upon the execution of their trust. The testatrix, at the time of her death, owned the household premises, No. 531 Sixth avenue, which, by the terms of the will, passed to the five grandchildren of the testatrix.

The grandchildren (legatees under the will), to avoid the employment of a real estate agent to collect the rents, and to induce the plaintiff, as executrix, to do this work in person, executed a writing dated January 4, 1882, in and by which "they consented" that the plaintiff might thereafter occupy the south side of the third floor of said house,

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"free of rent," on condition that the plaintiff in person collected the rents from the other portions of said premises.

Under this agreement, the plaintiff collected the rents and occupied the portion of the premises assigned to her as aforesaid.

Upon rendering her final account to the surrogate, the plaintiff, acting upon the authority of the agreement executed by the legatees, did not charge herself with the rent of the rooms she occupied.

The infant legatees (by their guardian) filed objections to the account, claiming the plaintiff should be charged with the rent of said rooms.

The auditor to whom the accounting was referred held that the agreement executed by the legatees was null and void. The surrogate in all things confirmed this report, and, in the final decree which he made, charged the plaintiff with the rental value of the rooms she occupied, fixing the amount at \$394.50, which sum the plaintiff was in consequence obliged to pay.

The binding force of the agreement executed by the legatees was directly brought to issue before the surrogate, and his decision, holding it to be null and void, is conclusive on the subject, as to the parties to this litigation, all of whom were parties to the surrogate's adjudication (*Nealley v. Nealley*, 89 *N. Y.* 353). If the agreement was invalid against the estate merely as allowing the executrix a greater compensation than the statute commissions, yet valid in any form against the legatees, or any of them, individually, under the rule laid down in *Collier v. Munn* (41 *N. Y.* 143), the surrogate might have enforced the contract, so far as legal, against the individual interest of the legatees; in other words, he might have treated the agreement valid as a waiver by the adult legatees (at least) of their proportionate part of the rental of the rooms, by deducting so much from the distributive share; but the decree which the surrogate made went to the extent of holding the agreement null and void, and the

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accounting proceeded as if no such agreement had ever been made.

The adult legatees did not repudiate the agreement, but the infant legatees, by their guardian, did repudiate.

The paper executed by the legatees contains no express covenant or guaranty, and no provision for indemnity. It is the nature of a license,—or, to use its own term, “a consent,”—which was calculated to discharge rather than create a personal liability on their part.

The decision made by the surrogate is not open to review in this collateral manner, but must be taken as final and conclusive.

It follows that the plaintiff has no cause of action to recover back the money paid, and that there must be judgment in favor of the defendants.

Affirmed on appeal by general term.

New York Supreme Court.

General Term.

SANDFORD *against* WHEELER.

Promise to repay money paid by mistake. The plaintiff by mistake paid a sum of money to redeem defendant's premises from a tax sale. The defendant promised to repay plaintiff the sum paid, and the action was founded on this promise. *Held*, that the promise was valid, and the action maintainable. The plaintiff need not prove the regularity of the tax or the sale.

Thomas M. Wheeler, for appellant.

C. W. Sanford, for respondent.

DAVIS, P. J.—This action was brought upon an alleged promise of defendant to pay plaintiff a sum of money

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which the latter had, by mistake, paid to redeem the defendant's premises from a tax sale. On June 5, 1873, the plaintiff paid to the clerk of arrears of the corporation of the city of New York \$1,114.92 to redeem lot No. 329 on the map of the Sixteenth Ward. He made the payment, supposing it to be on lot No. 200 West Twenty-third street, but afterward ascertained that No. 291 on the ward map was in fact No. 130 West Twenty-third street, and was the property of the defendant. Both lots had been previously sold for taxes, and the time for redemption would expire soon after the time of such payment. Having discovered his mistake, the plaintiff claims that he wrote immediately to the defendant setting out the fact that he had paid by mistake the sum above mentioned to redeem his lot 130 West Twenty-eighth street from a sale for the taxes of 1866, 1867 and 1868, for which it had been sold on December 16, 1871, and that but for this payment a lease for ninety-nine years would have been executed to the purchaser on June 17, 1873, and that he had discovered the mistake, and therein requested the defendant to repay the money, and that, with full knowledge of these facts, the defendant promised to repay him the amount. The case was submitted to the jury on the trial upon the question whether the defendant had made such promise, and no exceptions were taken to the charge. The jury found for the plaintiff.

It is now sought to reverse the judgment, on the ground that the plaintiff was bound to show the legality and regularity in all respects of the tax, and of the proceedings taken to sell, and of the sale of the defendant's lot, before he could be legally entitled to recover under the promise. We think he was not bound to go to that extent. It was sufficient to show that the defendant's lot had in fact been sold for the taxes of the years mentioned, and that upon that sale a lease was about to be executed to the purchaser, and that the plaintiff, by mistake, paid the moneys and effected a complete redemption of the lot, and that, with

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the knowledge of these facts, the defendant promised to repay the same. By this promise the defendant treated the sale as a valid one. He might, of course, have made his promise conditional upon the legality of the sale, and in that case the plaintiff would have been put to the proof the defendant now seeks to require; but, as he did not choose to do this, he is estopped by his promise from setting up any such irregularity, or requiring the plaintiff to establish the validity of the sale before he is entitled to enforce the promise. By the promise as made he treated the payment of the money as properly made for his benefit, and the fact that it was made by the plaintiff, and operated to redeem the lot from the tax sale, and that the defendant enjoyed the benefit of such redemption, was sufficient consideration to uphold the promise.

The exceptions, therefore, taken in the course of the trial and presented to us on this argument, are immaterial, and the judgment should be affirmed.

This decision was affirmed by the court of appeals, April 9, 1878 (78 *N. Y.* 607). To the same effect, *Nixon v. Jenkins* (1 *Hill* 818).

City Court.

Trial Term—January, 1886.

ABRAHAM H. CLARK ET AL. *against* JOHN B.
ANDERSON ET AL.

Negligence—Overflow of water. Liability of occupant. A tenant is not chargeable with the duty of turning off a stop-cock on his premises, unless he has knowledge or notice that there is a stop-cock on his portion of the premises, and that there is danger of an overflow of water unless the stop-cock is turned off. Negligence cannot be inferred or guessed at from the mere fact of an injury. It must be proved. Tenants have the right to assume and act on the assumption that the water apparatus connected with the closets and house are so con-

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structed that they will carry away into the streets or sewers whatever water can, in the ordinary way, reach their premises or the closets attached to them.

Motion for a new trial on the judge's minutes.

McADAM, Ch. J.—This cause was first tried in February, 1884, before the court without a jury, and resulted in a judgment in favor of the plaintiffs.

Upon appeal, the judgment was reversed and a new trial ordered, on the ground that there was not sufficient proof of negligence on the part of the defendants, to charge them with the loss which the plaintiff suffered. The facts are fully stated in the opinion filed by the general term, February 25, 1885,* reference to which is made, as settling, so far, at least, as this court is concerned, the law applicable to the case. The action came up for new trial, and, after the plaintiffs rested their case, the complaint was dismissed on the ground that they had failed to prove any negligence on the part of the defendants, so that the ground of dismissal and of reversal by the general term are the same, and one followed the other as a necessary sequence; for, unless there is some fact, fixing liability on the defendants, proved on this trial, which was omitted on the one previously had, the decision of the general term ought to be followed. There is some little difference in the proof, but not sufficient to substantially change the facts or to alter the final result. The main fact stands prominently forth that the proximate cause of the injury was the failure to shut off the stop-cock on the defendants' floor, before leaving for the day on January 19, 1888, or the insufficiency of the waste-pipes connected with the water-closet (where the overflow occurred) to carry away the water as fast as it came in. The overflow occurred between Saturday night and Monday morning, when it was discovered. In determining

* See *ante*, page 115.

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this motion, these two grounds will be considered, and these two circumstances, regarded by the plaintiffs' counsel as material will be examined, with a view of determining whether all things considered negligence in the legal sense of that term have been successfully established against the defendants.

First, in regard to the stop-cock on the defendants' floor. From the time the defendants moved upon the floor they occupied, they had not shut off the stop-cock. No one told them they ought to shut it off. No reason why they should shut it off was ever made apparent, until the present injury occurred. No overflow had ever occurred before, and the defendants had not omitted any precaution which they had before exercised. Wherein, then, does the negligence consist? Unless it be incumbent upon every tenant who occupies a floor to search for stop-cocks and turn them off before he leaves for the day or retires for the night, it is clear that the defendants herein were not guilty of negligence in not looking for and turning off the stop-cock on their floor. They might have found the stop-cock if they had looked for it, and they might have gone further and turned off the water if they had known that was necessary for the safety of the building or of the property of the occupants. I hold that a tenant is not charged with this duty unless he has the knowledge or notice: First, that there is a stop-cock on his portion of the premises. Second, that there is danger of overflow or injury unless it is turned off. In other words, a tenant who moves into a house has the right to assume that the water-pipes and plumbing are in good order and well regulated, and will answer all the requirements of such fixtures, so that damage will not occur except by misuse or gross neglect. The defendants did no more nor less on this occasion than they had done since they had moved into the building. They were never charged with negligence before; but, because the water ascended to their floor for the first time on that particular

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Sunday, and the water fixtures failed to carry the water away as fast as it came in, the charge of neglect is made. The defendants did not act out of the ordinary course, but strictly according to it. The overflow was unexpected, they had no reason to anticipate it, and they were certainly not the cause of it. It is not necessary to put the fault on any person not a party to the action, for it is sufficient for present purposes that the plaintiffs have failed to establish negligence against the defendants, and have, in consequence, failed to put the fault upon them.

Second. In regard to the insufficiency of the waste-pipes. The plumbing work was not put in by the defendants. They had nothing to do with its construction, and they are in no way liable for its imperfections or insufficiencies. The pipes were there when they moved in, and were in the same condition when the accident occurred. There is certainly nothing in this theory upon which negligence could be found against the defendants. The plaintiffs' counsel claims that the defendants may be held on two other grounds, viz.: First, because they had the plumbing repaired. Second, because they allowed the drip and safe to be clogged up.

The defendants did not change the plumbing work, and no act of theirs in repairing caused the overflow or prevented the pipes from carrying the water away; so that the act of repairing is in no way associated with the cause of the injury. The pressure of water at nights and on Sundays is so great in the lower portion of the city (according to the evidence), that, unless shut off, the water is likely to ascend on those occasions much higher than during the day, when the use of water by manufacturers and others diminishes the supply. This circumstance, it appears, caused the overflow; but there is no evidence that the defendants knew, or had reason to believe, that the overflow would, or even might, occur unless the stop-cock was shut off. Why an overflow had not occurred before does not appear. It must be assumed that there was

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never such a pressure of water before, or that some one on the lower floors had previously shut the water off, and that it did not in consequence ascend. The clogging of the drip-pan or safe had nothing to do with the cause of the injury. The drip-pan was never intended to carry away a steady stream or overflow of water. It was what its name implies—a pan for collecting dripping. The tell-tale ran into the drip-pan to indicate that the tank on the closet was full, so that the man pumping the water up (it had to be pumped up in the daytime) could tell when to stop pumping. The dripping of temporary overflow was notice to him to stop his efforts as the tank was full.

These drippings were not sufficient to overflow the pan, wet the floors, or damage property, and the damage complained of did not arise from the use of the pump, or drip-pan or safe. The contention is, that after every one had left the building for the day the water ascended up to the tank on defendants' floor, and, because the stop-cock was not shut off and the fixtures connected with the closet tank did not carry the water away as fast as it came in, the overflow occurred, thus, of course, doing the damage complained of. It requires no scientist or skilled expert to determine the cause of the damage. The case is unfortunate in this: the plaintiffs have suffered an honest loss, and ought to be compensated for it; they feel that they ought to have a legal remedy against some one, and there is generally no wrong without a remedy, and they have concluded that as the water that did the damage came from the defendants' floor, they should make good the loss. This is natural enough, but this result does not necessarily follow; for, in order to establish a valid claim against the defendants, the plaintiffs are bound to prove affirmatively that the damages were caused by some negligent act on the part of the defendants, either of omission or commission. The text-books tell us that negligence cannot be inferred from the mere fact of an injury, nor

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can it be guessed at. It must be proved. It has not been proved in this case.

If the defendants had done or omitted to do, on this occasion, anything which they had done before, or if they had omitted any precaution which they had been warned to take, and damages had ensued in consequence, negligence would be established. But the mere omission to shut off a stop-cock, which the defendants had never shut off before, and in respect to the uses and purposes of which they had never been instructed, is not evidence from which negligence is necessarily inferable. They had no notice or admonition that the failure to shut off the stop-cock would or might cause or permit an overflow or produce any injurious results, and they were not bound to know that the evil results would follow the omission. They had the right to assume and act upon the assumption that the water apparatus connected with the closets and house were so constructed that they would continue to carry away into the streets or sewers whatever water could in the ordinary way reach their premises or the closets attached to them.

A person who undertakes to do an act, and does it so carelessly as to injure his neighbor, is clearly guilty of negligence; but a person who remains passive and does nothing is not guilty of negligence, unless he is under some duty to act, and fails to act, and damage in consequence results. No such duty was imposed on the defendants in the absence or notice of admonition. Stop-cocks are generally intended to shut off the water while repairs above them are going on, and the defendants were not informed that the stop-cock on their floor was intended for any purpose. Upon the entire case, it seems to me that the facts are substantially the same as they were at the general term on the former appeal.

The new testimony has not improved the case, nor has the evidence omitted strengthened it.

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It follows that the motion for a new trial must be denied, with costs.

In *Shugio v. Hunting* (9 *St. Rep.* 286), an appeal was taken from a judgment recovered on the dismissal of the plaintiff's complaint. The plaintiff was engaged in the business of Japanese goods. On the morning of July 22, 1885, his premises had been flooded with water and his goods damaged. The water apparently proceeded from the second floor, which was over the store. In that apartment a pump was found much out of order, from which the water had probably flowed. Before the occurrence, defendant's agent had the pump repaired, but the repairs did not prevent the discharge of water. The plaintiff could have turned off the water in the basement and prevented an overflow. The plaintiff offered to prove that he had been instructed by the defendant's agent how to turn the water off, and had turned it off every night at that place. The court refused to receive the evidence, and dismissed the complaint. *Held*, error, and new trial ordered.

City Court.

General Term—April, 1884.

REBECCA WILLIAMS *against* HENRY F. EVANS.

A judgment creditor may make such agreement or take such security as he pleases on discharging his debtor from arrest, so long as the officer has no beneficial interest therein.

Appeal from judgment entered on verdict in favor of the plaintiff.

McADAM, Ch. J.—The action is on a voluntary bond executed by the defendant; it is under seal, which implies a consideration, and expresses an actual consideration as well. The bond was not to the sheriff but to the judgment creditor. Such bonds are not affected by the statute in reference to obligations exacted by the sheriff, *colore officii*.

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The creditor may make such agreement or take such security as he pleases on discharging his debtor from arrest, so long as the officer has no beneficial interest therein (*Winter v. Kinney*, 1 *N. Y.* 368; *Cook v. Frendenthal*, 80 *Id.* 202; *Soles v. Adees*, 84 *Id.* 237. The breach was clearly proved. There was no legal defense and the judgment is right. The exception at fol. 45 is of no value, as the question ruled out has no pertinency to any issue raised by the pleadings.

It follows that the judgment must be affirmed, with costs.

NEHRBAS and HYATT, JJ., concur.

City Court.

Trial Term—March, 1886.

ALBERT CRUMEILL BY GUARDIAN *against* ROBERT HILL.

Misdemeanor. Arrest by private person illegal. The defendant had reasonable cause to suspect the plaintiff and one Edgar of stealing a tub of butter, valued at fourteen dollars. They accompanied him to the police station, where they were locked up for the night. The next morning the police magistrate committed them for trial. They were subsequently tried. Edgar was convicted, and the plaintiff acquitted. There was a dispute whether the plaintiff voluntarily accompanied the defendant or was obliged to accompany him. *Held*, that as the crime was but a misdemeanor, under the Penal Code, the dispute should have been sent to the jury: for, if the plaintiff was forced to accompany the defendant, the arrest was illegal, and the plaintiff was entitled to recover for the illegal arrest, without proving malice, and was entitled to whatever damages he suffered up to the time of his formal committal by the magistrate.

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Motion for new trial upon the minutes.

J. C. Denison, for plaintiff.

Jeroloman & Arrowsmith, for defendant.

McADAM, CH. J.—On January 7, 1884, there was stolen from the possession of the defendant, a tub of butter worth fourteen dollars. It was stolen in the night time, and suspicion of guilt pointed to two boys, viz.: Edward Edgar and Albert Crumeill, the plaintiff.

The boys were sent for, and came to the plaintiff's store. Edgar admitted his guilt, and said that Crumeill had stolen the tub and carried it down to a stable and had there given it to him (Edgar). On this, the boys were requested to go to the station-house and they accompanied the defendant hither.

Upon the arrival of the parties at the station-house, the plaintiff told his story and the boys told theirs.

Edgar again confessed his guilt and implicated Crumeill as his confederate in the crime.

The captain locked up both boys. They were taken to the police court next morning, and the stories before told were repeated.

The boys waived examination, and were committed for trial at the special sessions.

In his examination before the magistrate, the prisoner, Edward Edgar, was asked the following :

“ *Question.* Give any explanation you may think proper of the circumstances appearing in the testimony against you, and state any facts which you think will tend to your exculpation ?”

To which he made the following :

“ *Answer.* Albert Crumeill took the tub of butter from the front of the premises of the complainant and carried it down to the stable and there handed it to me.”

Prior to the time when the plaintiff was sent for, he was seen in Edgar's company while the latter was trying to sell

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the stolen tub. Under these circumstances, any man of ordinary prudence would naturally have considered that he had reasonable and probable grounds for suspecting and believing that the two boys mentioned, were the thieves.

Upon the trial in the special sessions, the boy Edgar, who confessed his guilt, was fined one dollar, which he paid, and the plaintiff was pronounced "not guilty."

The plaintiff now sues the defendant for false imprisonment, claiming that as he was arrested without a warrant, and was finally acquitted, the defendant must be holden in damages for doing what he did. No one suggests that the defendant was actuated by malice, nor can it be seriously claimed, that the defendant acted without probable cause. Upon the trial, the complainant was discharged, and the present application is for a new trial upon the ground of error in ordering such dismissal.

It is practically conceded that if the defendant had obtained a warrant the plaintiff would have had no cause of action (*Scanlan v. Cowley*, 2 *Hilt.* 489); or that, if he had merely communicated the facts to an officer, requiring him to make the arrest on his own responsibility, the same result would have followed (*Brown v. Chadsey*, 39 *Barb.* 253). But because the tub of butter stolen was valued at but fourteen dollars, the crime (which, at common law, was a felony) having by the Penal Code been made a misdemeanor only (*Penal Code*, § 535), that the request of the plaintiff to accompany the said defendant to the station-house amounts to an arrest by a private person without warrant, and that hence the defendant is liable to some damages. In other words, it "gave the plaintiff (to use the language of the plaintiff's brief) a technical cause of action."

In *Thorne v. Levick* (94 *N. Y.* 90) the plaintiff, who was arrested at the defendant's request, was detained at the police station from November 3 till November 6, on which day he was discharged without any examination. The police

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record was, "Discharged on the evidence, as there was a mistake in identity," and this record was signed by the defendant. In other words, the defendant, over his own signature asked that the plaintiff be discharged because he (the defendant) had arrested the wrong man. In that case, the imprisonment was put on foot by the defendant, who finally terminated it on the ground that he had imprisoned the wrong man. These proofs certainly made out a case for the jury, and the judge on the trial (at p. 96) left it to the jury to say, whether there was probable cause for arrest or not. On the same page (96), the court of appeals said, "As no larceny was committed, it is not necessary to consider the question as to whether petit larceny is a felony."

In the present case, the plaintiff's own proofs made out a clear case of probable cause, and the defendant acted as almost any other business man would have done under like circumstances. The boy Edgar, who confessed his crime, was adjudged guilty on his own plea; but why fined one dollar only does not appear. The plaintiff was, fortunately for himself (all things considered), discharged. But the police captain held him, and the police justice held him. The plaintiff waived an examination and the special sessions acquitted him. In *Thorne v. Levick* (*supra*), there was no committal by a magistrate, and yet the court of appeals held that the complaint in that case alleged two causes of action: *First*, for false imprisonment in procuring plaintiff's arrest without a warrant for the alleged offense of stealing, &c.; *Second*, for malicious prosecution in preferring a charge for the same offense. Under the authority of this case, the plaintiff was entitled to go to the jury on the question whether he voluntarily accompanied the defendant to the police station, and whether the imprisonment there was by the authority and on the responsibility of the officer in charge,—in which case the defendant is not liable,—or whether the plaintiff was formally arrested by the defendant, and whether his impris-

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onment at the police station was by the direction and on the responsibility of the defendant. If the plaintiff had been charged with a felony, this course would have been unnecessary; but, as he was simply charged with a *misdeemeanor*, the case ought to have gone to the jury on these questions.

From the time the plaintiff was committed by the magistrate, the plaintiff is without any cause of action, so far as the proofs disclose, there being no malice, and the presence, rather than the absence, of probable cause, within the legal definition of that term (see *Carpenter v. Sheldon*, 5 *Sand.* 77).

The damages seem to be severable under the decision last cited, so that, if the facts are found by the jury in favor of the plaintiff, they may award him such damages as he sustained up to the time he was legally held by the magistrate.

The motion for a new trial will, therefore, be granted, without costs.

Petit Larceny Defined.

See *Penal Code*, § 585; and *People v. Finn*, 87 *N. Y.* 584.

Arrest by Private Person.

An arrest by a private individual is excused only where a felony has in fact been committed, and there was reasonable cause to suspect the person arrested, although in truth innocent of its commission; but a constable is justified in making an arrest without warrant, though no felony has been actually committed, if he has reasonable ground to suspect that one has been, and acts in good faith and without evil design (*Burns v. Erben*, 40 *N. Y.* 468; *Cooley on Torts*, 174).

Officer Serving his Own Process.

Where the officer is a party, neither he nor his deputy can serve the process (*Cooley on Torts*, 191; *Crocker on Sheriff's*, § 2; *Contra, Cowen Tr.* § 869).

Arrest for Misdemeanor Without a Warrant.

Arrest of citizen for misdemeanor without warrant illegal, unless act committed in presence of officer (*Code Crim. Pro.* § 188;

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Addison on Torts, Wood's ed. § 804, p. 19; *Phillips v. Trull*, 11 *Johns.* 486; *Wood v. Brooklyn*, 14 *Barb.* 425; *Para v. Becknet*, 8 *Ind.* 475; *Burns v. Erben*, 40 *N. Y.* 468; *Thorne v. Levick*, 94 *Id.* 90; *Meyer v. Clark*, 41 *N. Y. Super. Ct.* 107; *People v. Pratt*, 22 *Hun*, 800.

Marine Court.

Trial Term—January, 1876.

DAVID KRAKAUER *against* H. HARDMAN.

Effect of accepting order for merchandise. One Orvis drew an order on the defendant directing him "to let Nathan Hess have one style 2, 7½ octave piano on the drawer's lumber account." The defendant wrote across the face of the order these words: "The above piano is to be delivered in thirty days or less," and then subscribed his name. Hess, the payee, then wrote on the back of the order these words: "Please deliver the piano to D. Krakauer, and oblige Nathan Hess." The defendant refused to deliver the piano, and the plaintiff sued to recover \$200 damages. *Held*, that the order was not a negotiable instrument; that the equities of the parties were open, and their rights required proof; that, as the drawer had no piano in the drawee's possession, the order could not operate as an equitable assignment of title; and that the mere production of the order, with proof of demand and refusal to deliver, did not establish a cause of action against the defendant. The mere retention of such an order does not amount to an acceptance.

Trial by the court without a jury.

McADAM, Ch. J.—The instrument sued upon is a common order drawn by Charles B. Orvis upon the defendant, in and by which the defendant is directed "to let Nathan Hess, or order, have one style 2, 7½ octave piano, on the drawer's lumber account." Hess, the payee, presented the order to the defendant, who wrote upon its face these words: "The above piano is to be delivered in thirty days

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or less," and then subscribed his name. Hess, the payee, then wrote upon the back of the order these words: "Please deliver the piano to D. Krakauer and oblige Nathan Hess," and D. Krakauer, upon the strength of this order bases his right to recover \$200 as damages suffered by the subsequent refusal of the defendant to deliver the piano according to the defendant's acceptance.

The evidence fails to show any "lumber account" owing by the drawee to the drawer, or any account which warranted the order in question. It fails to show that the defendant held any piano which belonged to the drawer or over which he had any right of direction or control. It fails to show that the drawer had any legal claim against the drawee for a piano which he could have enforced if he had not given the order. If the drawer had no legal claim against the defendant, let us ascertain whether the order, after it was accepted by the defendant, gave the payee and his transferee a right of action when the drawer had none. In the first place, the order is not what is known as a negotiable instrument. It is certainly not a bill of exchange within the meaning of the term as established by the law merchant (*Cook v. Satterlee*, 6 *Cow.* 108; *Atkinson v. Marks*, 1 *Id.* 691; *Lent v. Hodgman*, 15 *Barb.* 274; *Story on Promissory Notes* § 17; 7 *Johns.* 321; *Edwards on Bills*, 2 ed. 138); and is not therefore to be construed according to the rules peculiar to negotiable instruments.

It is not, technically speaking, a tri-partite agreement between the drawer, drawee and payee. No one agrees to sell or buy anything, or pay anything. No price is fixed, nor terms of sale or delivery mentioned, except the words "to be delivered within thirty days or less."

The payee paid nothing to the defendant, and it does not appear that he altered his position financially by anything the defendant said or did, so that the doctrine of equitable estoppel does not enter into the case. So far as the evidence discloses, the order, as between the drawer, drawee

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and payee was without consideration, and the plaintiff, as its transferee or assignee, succeeded to the ownership of a writing which lacks the elements essential to its validity.

Ford v. Adams (2 *Barb.* 349), was an action on a somewhat similar order, and the court held that no recovery could be had against the acceptor thereon.

Briggs v. Sizer (30 *N. Y.* 347) was an action against the defendant to charge him as the acceptor of an order requesting him to deliver to the plaintiff five hundred pounds of carrot seed, and the court of appeals placed its decision for the defendant on the ground that there was no proper acceptance of the order; that, as the instrument was not negotiable, its mere retention did not amount to an acceptance; so that the point decided does not touch the question presented in this case.

Leux v. Jansen (18 *How. Pr.* 265), was an action where a recovery by a transferee of an order for merchandise against the drawer was sustained, and is an authority in this case, only so far as it decides that an acceptance put on the back of an order similar in form to that indorsed upon the one in suit by Hess, the payee, operated as an equitable assignment of the payee's rights, and substituted the transferee to the rights and remedies of the payee, whatever those may be.

As Hess, the payee of the order in suit, upon the principles stated, acquired no cause of action against the defendant by the acceptance, none was created by the transfer to the plaintiff, who occupies no better position.

How far the doctrine of equitable estoppel might have assisted the plaintiff need not be considered, for there is no proof making it applicable to this case.

The proofs bring it within *Lord v. Adams* (*supra*), and the defendant is entitled to a judgment.

Affirmed on appeal.

Acceptance of Bills.

Acceptance must be in writing (8 *R. S.* 6 ed. 1160, § 6). An unconditional promise in writing to accept a bill before it is drawn is

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deemed an actual acceptance (*Id.* § 8; 1 *City Ct. R.* 415). If the drawee destroys the bill or refuses to return it within twenty-four hours he is deemed to have accepted it (3 *R. S.* 6 ed. § 11). The holder of an order for personal property may require the acceptance of the order (*Briggs v. Sizer*, 80 *N. Y.* 652), although it is usually satisfied by the delivery of the property, and the possession of such an order by the drawee, unexplained, is evidence that it has been satisfied (*Id.*).

Order Operating as Equitable Assignment.

That order may operate as an equitable assignment see *Lowrey v. Stewart*, 25 *N. Y.* 289; *Parker v. City of Syracuse*, 81 *N. Y.* 376; *Wells v. Williams*, 89 *Barb.* 567; *Morton v. Taylor*, 1 *Hill* 583; *Munger v. Shannon*, 61 *N. Y.* 251; *Gallagher v. Nichols*, 60 *Id.* 488; *Dannat v. Comptroller*, 77 *Id.* 45; and seen notes to section 1910 of Bliss' Code.

Must be Drawn on a Particular Fund.

To operate as an equitable assignment the order must be drawn on a particular fund (*Attorney General v. Continental Life Ins. Co.*, 71 *N. Y.* 325. See also 57 *Id.* 459).

Order for Goods.

An order requesting the drawee to deliver goods to a specified amount does not operate as an equitable assignment of the debt owing by the drawee to the drawer (*Reid v. Pryor*, 20 *Ab. Law. J.* 58).

MARINE COURT.

Trial Term—April, 1878.

PILZEMAYER *against* WALSH.

Landlord and tenant. Liability of assignees, &c. Where rent is payable monthly in advance, and the assignee enters in the middle of the month, he is not liable for any portion of the current month, but only for rent subsequently falling due.

McADAM, J.—Where an assignee for the benefit of creditors is by his acts deemed to have accepted the

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transfer of a lease held by the assignor, he will not be personally liable for rent which became due before he entered. Thus, when the rent is payable monthly in advance, and the assignee enters in the middle of the month, he is not liable for any portion of the rent of the current month, but only under the covenants of the lease for rent subsequently falling due. (*Fowler v. Moller*, 4 *Bosw.* 149; *Durand v. Curtis*, 57 *N. Y.* 7; 2 *Platt on Leases*, 416; 11 *Barb.* 594.

Judgment in accordance herewith.

See *Lynch v. Rinaldo*, 58 *How. Pr.* 133, and note thereto. As to apportioning rent, see *McAdam Landl. & T.* 2 ed. 345.

City Court.

Trial Term—February, 1886.

STEVENSON *against* THE COUNTING ROOM CO.

In order to charge a corporation with the debt of another corporation, it is necessary for the plaintiff to show that the defendant (corporation), at a meeting of its board of directors, assumed the debt in a legal manner.

McADAM, Ch. J.—The defendant was organized as a corporation January 1, 1884, under the act in regard to business corporations (*Laws* 1875, c. 611). Work was done for the defendant to the amount of \$6.70, and for this sum, with 73 cents interest, aggregating \$7.43, the plaintiff is entitled to judgment. The balance of the plaintiff's bill is for work done, prior to the time of the defendant's incorporation, for the "American Counting Room Co.," another corporation, which failed shortly prior to the time when the defendant was incorporated.

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The plaintiff seeks to hold the defendant for the bill contracted by the prior corporation; but the only proof connecting the defendant with it is a conversation had with one Hopkins, the secretary and treasurer of the defendant, who was connected officially with the former corporation. This evidence is insufficient. In order to charge the debt of the former corporation on the defendant, it was necessary for the plaintiff to prove that the directors of the defendant, at a meeting of the board, in a legal manner, assumed the debt. This was necessary in order to make the assumption a corporate act. The officers of a corporation are mere agents, and possess only such powers as are necessary to enable them to perform the duties incidental to their office. Assuming the debts of another corporation is no part of the duties of an officer, and there is no implied power to charge the corporation thereby. Such acts are foreign to his mission. One who deals with officers of a corporation is bound to know their powers and the extent of their authority, and the corporation is only bound by their acts which are within the scope of their authority (*Alexander v. Cauldwell*, 83 *N. Y.* 480).

There is a well recognized distinction between the acts of an officer incidental to his duties, and in respect to which he has an implied authority to bind the corporation, and those foreign to his duties, as to which the corporation by its board of directors must act in order to charge it. The two corporations were independent legal entities,—as much so as two individuals,—and the fact that the defendant, in some form not made clear, succeeded to the publication issued by the former corporation does not charge it with the debts owing by such other corporation. Corporations, like individuals, may purchase assets without assuming the liabilities of the vendor. If assumption is alleged, it must be legally proved.

For the reason stated, the complaint will be dismissed

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as to the work done for the prior corporation, and judgment given in favor of the plaintiff for the \$7.43 contracted and owing by the defendant.

City Court.

Trial Term—February, 1886.

EWALD MOMMER ET. AL *against* ALBERT
FRIEDLANDER.

In order to constitute an acceptance of goods sufficient to take the case out of the statute of frauds, there must be a final and absolute appropriation by the purchaser of the whole article sold or a part thereof. The mere receipt of the goods is not sufficient.

Motion for new trial on the minutes.

Kaufman & Sanders, for the motion.

Geo. W. Galinger, opposed.

McADAM, Ch. J.—The goods sold exceeded \$50 in value. No part of the purchase price was paid at the time, and there was no note or memorandum of the contract signed by the parties to be charged, and the complaint was dismissed because there was no acceptance of the goods by the defendant so as to charge him under the statute of frauds. The plaintiffs move for a new trial, and the question presented is whether there was due acceptance of the goods by the defendant sufficient to satisfy the statute. The law on the subject will be considered first; the facts next.

In order to satisfy the statute, there must be "a final and absolute appropriation by the purchaser, either of the whole article sold, or of a part thereof" (*Story on Sales*,

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§ 276). The acceptance must be final, complete and irrevocable (*Id.*). No act of the seller alone, in however strict conformity to the terms of the contract, will satisfy the statute. There must be the acts of the buyer of accepting and actually receiving part of the goods sold, beyond the mere fact of entering into the contract, to bind the latter. The buyer must have exercised his option to receive the goods or not, or having done something that has deprived him of his option, and there can be no acceptance and actual receipt of goods within the statute unless the vendee has had an opportunity of judging whether the goods sent corresponded with his order for them (see notes to *Story on Sales*, 4 ed. 277): "No act of the vendor alone, in the performance of a contract of sale void by the statute of frauds, can give validity to such a contract. If the contract is oral, and no part of the price is paid by the vendee, there must not only be a delivery of the goods by the vendor, but a receipt and acceptance of them by the vendee, to pass the title, or make the vendee liable for the price, and this acceptance must be voluntary and unconditional. Even the receipt of the goods without an acceptance is not sufficient. Some act or conduct on the part of the vendee or his authorized agent, manifesting an intention to accept the goods as a performance of the contract, or to appropriate them, is required to supply the place of the written contract" (Calkins v. Hellman, 47 *N. Y.* 449, 452; Hermance v. Taylor, 14 *Hun.* 149; Shindler v. Houston, 1 *N. Y.* 261; Wade v. N. Y. & M. R. R. Co., 52 *Id.* 627; Stone v. Browning, 68 *Id.* 598; S. C., 51 *Id.* 211; Cook v. Millard, 65 *Id.* 352; Aldrich v. Pyatt, 64 *Barb.* 391; Allard v. Greasert, 61 *N. Y.* 1).

There is no evidence in this case showing an intention to accept the goods. On the contrary, there appears an absolute refusal to accept, and there is nothing from which the jury could legally infer or find an acceptance within the meaning of that term as defined by the authorities.

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The claim that the defendant accepted part of the goods is untenable. The part said to have been accepted was in the possession of the defendant before the sale, and he did no act or thing inconsistent with his former possession. There is nothing in this circumstance from which an acceptance, "in part performance of the contract" sued on, could be implied (*Duplex Co. v. McGuinness*, 64 *How. Pr.* 99). The facts are undisputed, and, if they fail to make out a legal contract of sale sufficient to satisfy the statute of frauds, it is clear that a verdict of the jury holding that the plaintiff had made out such a contract, would not be allowed to stand, and hence a proper case for submission was not made out. Lord CAMPBELL, Ch. J., in *Marvin v. Wallis* (6 *El. & Bl.* 726) gave it as his opinion that the statute under consideration "does more harm than good. It promotes fraud rather than prevents it, and introduces distinctions, which I must confess are not productive of justice." However this may be, it is the law of the land, and must be enforced according to its letter and spirit.

The non-suit was properly granted, and the motion for a new trial must be denied.

Affirmed by general term on appeal.

City Court.

Trial Term—February, 1886.

HILDEBRAND *against* SCHENCK.

A tenant residing in a tenement house fell down stairs and sued the landlord on the ground that it was his duty to light the gas in the lower hall and that she fell because he failed to perform that duty. *Held*, that she could not recover.

As to liability for fall of ceiling, see note.

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Motion for new trial.

M. Altmeyer, for plaintiff.

John Hardy, for defendant.

McADAM, Ch. J.—The landlord agreed to furnish gas-light for the lower hallway of the tenement-house in which the plaintiff resided. On the night of February 5, 1883, the landlord failed to perform this duty. The plaintiff, while walking down stairs, fell and was injured, and sues to recover \$2,000. This is practically the entire case. The complaint was dismissed and the plaintiff moves for a new trial.

The direction was right. The plaintiff knew the gas was not burning at the time, and ought to, if safety required, have taken a candle or match to light the way. The danger was not a secret one, but patent, and was as apparent to the plaintiff as to the defendant. She had no right to walk in the dark at the defendant's risk. This remote kind of constructive or inferential negligence will not support an action (98 *N. Y.* 635). To sustain an action for negligence, the damage must be the legitimate sequence of the thing amiss; otherwise the cause is too remote (*Cooley on Torts*, 68). To illustrate: Suppose a gas company agrees to furnish gas to a dwelling, and fails to do so, does it in consequence become liable to inmates who fall down stairs? Certainly not. Such a possibility was not contemplated when the contract was made. The remedy is to furnish other light, and sue the company for the breach, and the damages will be those naturally flowing from the breach, but will not include bruises and wounds. Besides, the plaintiff was not free from fault; and between two wrongdoers the law leaves the consequences to rest where they have chanced to fall (*Cooley, supra*, 672).

Motion for new trial denied. (See 47 *N. Y. Super. Ct.* 341).

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Duty to Light Hallways.

The New York common pleas intimate, in *Pfeiffer v. Ringler*, 12 *Daly*, 489, that an employer does not owe to his workmen the duty of lighting his hallways, and in *O'Sullivan vs. Norwood*, 8 *St. Rep.* 888, hold that the landlord of a dwelling let in tenements to different tenants owes the duty of lighting the hallways, if this precaution is necessary to make them reasonably safe.

Effect of Previous Knowledge of Danger.

Where previous knowledge by a party injured, of a dangerous situation, or impending danger, from which a person of ordinary intelligence might reasonably apprehend injury, generally imposes on him greater care and caution in approaching it, the degree of care required is a question of fact for the jury, (*Palmer v. Dearing*, 93 *N. Y.* 7; *Bassett v. Fish*, 75 *Id.* 804; *Weed v. Village, etc.*, 76 *Id.* 827; *Niven v. City, etc.*, *Id.* 619; *Lanigan vs. N. Y. Gas Co.*, 71 *Id.* 29).

Defective Stairs.

The supreme court of Iowa held, in *Struble v. Chicago, M. & S. P. R.R. Co.* (38 *Reporter*, 280), that a workman who uses stairs must exercise proper watchfulness over their condition, and, if they are exposed to wear or destruction from use, he must see that repairs are made, or must report the fact to his employer or other person having charge of the thing to be repaired.

Injuries Sustained in Hallway.

One socially visiting a tenant may maintain an action for injuries by negligence against the landlord if they were caused by defects in the hall-way, of which the landlord had notice (*Henkel v. Miner*, 81 *Hun*, 28; *O'Sullivan v. Norwood*, 8 *St. Rep.* 888; *Palmer v. Dearing*, 93 *N. Y.*). If the landlord agrees to repair a defect, as to whether the tenant had the right to assume that it had been remedied, see 29 *N. Y.* 888; 75 *Id.* 808; 60 *Id.* 607; 78 *Id.* 814.

"The plaintiff in the court below sued the landlord for injuries sustained by catching her heel on a tack in the oil-cloth of the hallway. The court below charged that the plaintiff was entitled to recover damages. *Held*, where the owner of a building divides it into several tenements which he lets to various tenants, but retaining to himself control of the halls and stairways for the common use of the occupants

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and those who have lawful occasions to be there, he is bound to see that reasonable care and skill are required to render the halls and stairways reasonably fit for the uses which he thus invites others to make of them, and he is responsible for any injury which others, lawfully using them with due care, sustain through his failure to discharge his duty. But he is not answerable for defects which do not render the halls or stairways reasonably unfit for use, or which reasonable care and skill would not prevent. Rule made absolute." Opinion by Dixon, J., *Gibson v. Riley*, Supreme Ct. N. J., November 8, 1887.

Fall of Ceiling.

A tenant cannot recover damages from his landlord for personal injuries by the fall of ceiling which the landlord had covenanted to but failed to repair, since such damages could not have been within the contemplation of the parties, and because, if the tenant knew of the danger from the disrepair of the ceiling he voluntarily assumed the risk (*Kabus v. Frost*, 50 *N. Y. Super. Ct.* 72). In *Loring v. Clark*, *City Ct. Trial Term, March 1886*, McADAM, Ch. J., in his opinion said: "It is very difficult to lay down any general rule defining the cases in which a landlord is guilty of negligence and the tenant free from fault where the ceiling in a house falls and causes damage to person or property. The facts which charge negligence upon the landlord generally impute knowledge of the danger to the tenant in actual use of the premises, who, in consequence, becomes chargeable with contributory negligence for remaining in a place of known danger when his plain duty is to avoid it. No secret defect has been shown, and no notice to or knowledge in the landlord has been proved. The witnesses produced by the defendant proved that the plastering and water-pipes were put in thorough order. These witnesses were disinterested business men, whose evidence is entitled to credence. Under the circumstances, the fall must be attributed to accident, rather than want of care or neglect of duty on the part of the landlord, and there must be judgment for the defendant, with costs, and 2½ per cent allowance."

In *White v. Sprague* (9 *St. Rep.* 220), a janitress was held entitled to recover for the fall of a ceiling in a tenant house, where it appeared that the accident occurred on March 23, 1885, and, either in the last of February, or the first week in March, the landlord's attention was called to the condition of the plastering, which at that time had become badly cracked and somewhat threatening. Evidence was given of the fact that the landlord then stated that he would have the plastering attended to right away, although he did not at the time consider it to be dangerous. But he gave the subject no further attention until after the happening of the accident. Upon this evidence, the court held

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that the landlord was chargeable with negligence, upon the rule that "if a landlord lets premises, and agrees to keep them in repair, and he fails to do so, in consequence of which any one lawfully upon the premises has been injured, he is responsible for his own negligence to the party injured" (Citing *Edwards v. New York & Harlem R. R. Co.*, 98 N. Y. 245, 248, 249).

City Court.

General Term—February, 1886.

EDMOND FOUGERA, PLAINTIFF AND RESPONDENT,
against ISIDOR COHN ET AL., DEFENDANTS
AND APPELLANTS.

An undisclosed principal may sue in his own name upon a parol contract made in the name of the agent, providing it creates obligations and gives remedies which are mutual; but where an agent executes a lease in his own name as landlord, for a longer term than one year, in a manner not authorized, and the act in consequence does not bind his principal, the latter cannot in turn enforce any liability upon it against the tenant.

Leases for a longer period than one year must be subscribed by the landlord or his agent thereunto duly authorized by writing.

A seal is not necessary on a lease for a term of one year or more.

Simpson & Werner, for appellants.

Coudert Bros., for respondents.

McADAM, Ch. J.—The lease on which the recovery was had was executed between "Leonard Moody, agent for E. Fougera, as landlord," and the defendants as tenants. It was signed "Leonard Moody, ag.," and by the defendants. Not being under seal, the lease is regarded as an ordinary parol contract; and if binding in law, the principal, may if he so elects, maintain an action upon it (*Nicoll v. Burke*,

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78 *N. Y.* 581; *Schaeffer v. Henkel*, 7 *Abb. N. C.* 1), or the lessees might in turn prosecute him upon the contract, even though not named in it. For this reason, parol evidence is competent to show that a defendant, though not named in the instrument and not previously disclosed, was the principal of the nominal party, and this although the other contracting party supposed that the latter was acting for himself. This rule applies as well to contracts (other than negotiable instruments) which are required to be in writing as to those to which a writing is not necessary (*Briggs v. Partridge*, 64 *N. Y.* 357).

The doctrine thus asserted has this title to commendation and support—that it not only furnishes a sound rule for the exposition of contracts, but that it proceeds upon a principle of reciprocity and gives to the other contracting parties the same rights and remedies which they possess against him (*Story on Agency*, § 160 *a*). This leads to the inquiry whether the lease executed by the agent in this case was authorized in such a manner as to give the tenant a cause of action against the plaintiff, as principal, in case of the breach of the covenants entered into by the agent, as landlord (see authorities collated in note to *Story on Agency*, 9 ed. p. 192); for, if the act of the agent did not furnish the tenant a remedy against the plaintiff in such a contingency, there is such a want of mutuality of obligation between the parties to the record as to leave the contract without force or validity in favor of either against the other. In short, there can be no valid contract without two or more contracting parties between whom there are reciprocal obligations of some kind or character.

There is no evidence that the defendants ever entered into possession under the lease, or ever occupied the leasehold premises. This circumstance is material, only so far, that possession and occupation, even under a void lease, may make the lessee liable for the time of occupancy, the lease being regarded as controlling only as to the amount

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of rent and mode of payment. But this element is out of the record, and we are left to determine and enforce the legal rights and obligations of the parties, created by and flowing from the execution of the lease, unaided by proof of entry or occupation thereunder.

Under the statute of frauds (29 Car. II., c. 3, §§ 1, 3), relating to the creation, assignment and surrender of leases and estates and interests in lands, it is required that agents to be appointed to effect such transactions shall be authorized by writing, although, under section 17, relating to contracts for the sale of goods, it is required that there shall be a memorandum of such contracts in writing, and signed by the party to be charged therewith or his agent lawfully authorized. The mode of authorizing the agent is left open, and it may be made in any sufficient manner (*Leake Law of Contracts*, 266). The statute of this State contains similar provisions (3 R. S. 6 ed. 141, § 141, subd. 6), and if the lease be for a longer period than one year, it must be in writing, "subscribed by the party creating or granting the same, or by his lawful agent thereunto authorized by writing." (See also *Post v. Martens*, 2 *Robt.* 437; *Porter v. Bleiler*, 17 *Barb.* 149; *Smith v. Genet*, 2 *City Ct. R.* 88).

The lease in question was for a term of two years and five months, and the authority to execute it was not in writing, and, under the statute and authorities cited, it is unauthorized and consequently void, and no liability in favor of either party to this record as against the other can arise from its execution. If the lease had been valid, the want of a seal would not have invalidated it (2 *Barb.* 618); but the difficulty is, that it never had legal validity as between the litigating parties. Its execution, therefore, did not furnish the plaintiff with any cause of action against the defendants.

It follows that the judgment rendered in favor of the plaintiff must be reversed, and a new trial ordered, with costs to the appellants to abide the event.

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HYATT and HALL, JJ., concur.

In *Fougere v. Cohn* (6 St. R. 733) it was held, that although the lease above referred to was void, yet, as it was proved on the trial of that case, that the defendant entered under it, the relation was implied for one year.

City Court.*Trial Term—February, 1886.*ELIZABETH GOFF *against* WILLIAM B. WHITNEY.

A stockholder of a corporation, created under the general manufacturing act, is not personally liable, unless the debt contracted by the corporation is payable within one year. He is not liable for rent under a lease to the corporation, having two years and more to run.

Trial by the court without a jury.

McADAM, Ch. J.—The action is brought to charge the defendant, as stockholder of a manufacturing company, with a debt of the corporation, because no certificate was filed proving the amount of capital fixed and paid in (2 R. S. 6 ed. 504, § 38, old § 10). The established rule of interpretation is to construe these statutes strictly (77 N. Y. 1). This mode of construction will, therefore, be followed. The lease is dated February 11, 1884, and the liability that ripened into a debt was contracted then (*Cox v. Gould*, 4 Blatchf. 341).

The defendant became a stockholder July 1, 1884. There are authorities holding that a stockholder is not liable for debts contracted prior to the time he purchased his stock (18 Barb. 152; 11 Hun, 141; 7 Barb. 279), but I doubt the application of this rule to a continuing obligation like a lease where money is payable monthly, quar-

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terly, or the like, and where the default in paying the installment is that which gives rise to what is technically called "the debt," and this failure to pay occurs during the time the particular person sought to be charged is a stockholder (17 *N. Y.* 465). But this is only one theory of the defense. I prefer to put my decision upon another. Section 24, now section 59, of the act provides that "no stockholder shall be personally liable for the payment of any debt contracted by the company which is not to be paid within one year from the time the debt is contracted." This literally means that the entire debt must, by the terms of the contract, be paid within one year (see *Hill v. Conkling*, 7 *Daly*, 397; *Dean v. Mace*, 19 *Hun*, 391; *Handy v. Draper*, 89 *N. Y.* 334). If it means anything else, it is difficult to imagine any case in which an installment is payable within the year that comes within its provisions, no matter how long the duration of the contract. It will not do to say that an installment falling due during the year is the debt contemplated by this section, because the statute refers to the entire "debt contracted," and not to divisible portions of it. The statute serves creditors and stockholders alike in this, that both are informed that personal obligations against stockholders are to be enforced only in cases where the contract imposing the liability is to be fulfilled within one year.

The stockholder for protection may keep himself informed as to corporate contracts made during the year, without being required to go further and search for obligations made perhaps years before, to ascertain if they call for continuing yearly or quarterly installments. The statute, construed in any other form, becomes oscillating and unreliable. The expressions "debt" and "debt contracted" have been variously construed, but the strict interpretation required in this class of cases (77 *N. Y.* 1) at once suggests the necessity of giving to the statute a meaning that is fixed and certain and does not require the

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apportionment of obligations arising under one and the same contract.

The lease was for a term exceeding two years and the rent payable monthly. By it the landlord gave the privilege of occupying his building; he was to give no more. Mere effluxion of time required the corporation to make the payment, the lease being the source of liability.

In this respect, the case differs from *Garrison v. Howe*, 17 N. Y., 465, where lumber was to be delivered, and the court said the contract "contains mutual stipulations by the plaintiff to furnish and by the defendant to pay for the lumber; and there is no debt in existence until lumber has been delivered."

McMaster v. Davidson, 29 Hun, 542, was decided on the same principle. Here, the landlord, by his lease, gave the privilege of occupying his property; he was to give no more, so that the lease created the obligation to pay. The liability was contracted the moment the lease was signed, though the rent was payable by installments, which did not assume the technical form of "debts" until due, according to the terms of the lease.

In *Lewis v. Ryder*, 13 Abb. Pr. 1, the lease was for one year only, and that case consequently did not decide the question involved here.

McIntyre v. Strong, 63 How. Pr. 43, was an action against a stockholder in a business company organized under the act of 1875, chapter 611, which contains a provision similar to section 24, *supra*, excepting that in the act of 1875, § 25, the limitation is two years instead of one as provided in the act under consideration. In that case, the defendant was sought to be held for installments of rent under a lease for five years, and the superior court, at general term, held that the stockholder was liable for rent payable "within two years from the time of executing the contract." This was certainly as liberal a construction of a penal statute as could be given, but even under this decision no recovery can be had herein.

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The first year's rent, under the lease herein, was paid by the corporation and by the receiver thereof appointed by the supreme court. The present action is for the March rent in advance, and the value of steam power in addition thereto. The rent up to March, 1885 was paid. The complaint herein refers to the February rent as unpaid, but the evidence and the judgment against the corporation show that this is an error, and that the March rent in advance was alone intended.

For the reason stated, and without discussing the other objections urged against a recovery, and complaint must be dismissed, with costs.

City Court.

Trial Term—March, 1886.

WYCKOFF *against* RAY.

Where a note, check or draft is indorsed John Doe, "prest.," "cashier," or "treasurer," it may be the obligation of the corporation Doe represents, if the act be for its benefit, but where the intention is clear that the act was intended to create an individual liability, Doe is personally liable.

McADAM Ch. J.—Where a note, check or draft is indorsed John Doe, "prest.," "cashier," or "treasurer," it may be the obligation of the corporation John Doe represents, because the individuals holding these responsible positions are the chief financial agents of the institution, through and by whom it acts, and if the indorsement be for the exclusive benefit of the corporation, and as its act, the suffix of "prest.," "cash.," or "treas." may shield the officer from personal liability (1 *Daniel on Neg. Ins.* §

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417). I use the word "may" because the rule suggested is not immutable; it has its exceptions (see 4 *N. Y.* 208; 9 *Id.* 571). For example the same strictness is not required in the execution of commercial paper "between banks," that is necessary between individuals, as the indorsement by a cashier in his official capacity sufficiently shows that the indorsement is made for his bank (19 *N. Y.* at p. 318). Upon this ground, prefixing the name of the corporation is a mere ceremony, rendered unnecessary by the maxim, that "an expression in a contract which the law implies works nothing" (19 *N. Y.* at p. 319). But this action is between individuals and the indorsement was not the act of the corporation.

The following among other reasons establish personal liability against the defendant.

The note is signed by the "Ray Manufacturing Co., Jas. D. Ray, prest." This made the note the corporate act of the corporation. It was payable to "Wm. H. Beall," and was by him indorsed. Nothing further was needed to charge the corporation. The subsequent indorsement, "Jas. D. Ray, prest.," was not required to pass title; it was intended to create an individual responsibility, or it is without legal significance. The law will not infer that this indorsement was put there without a purpose. Its only object could have been to charge Ray individually. In other words, to add him as a party to the obligation, the suffix "prest." being in this instance merely *descriptio personæ* of the person sought to be charged. It did not exempt him from personal responsibility as indorser. The plaintiff declined to take the note, unless the defendant indorsed it. This meant an individual indorsement, as the corporation was already liable on the note as maker. The money given for the note did not go into the treasury of the corporation. It went to the defendant, who gave it to his daughter. It was to an extent his personal transaction. These circumstances impress on the defendant's act an individual interest and liability as indorser, and

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show that credit was given to him as an individual, not as an official (see 4 N. Y. 208; 9 *Id.* 571, *supra*), and this I find as a matter of fact (97 N. Y. 635).

I therefore find in favor of the plaintiff for the sum of \$1,106.76, with costs.

City Court.

Trial Term—March, 1886.

BRIDGET E. NELLIGAN *against* NEW YORK
TYPOGRAPHICAL UNION No. 6.

The action was brought to recover the sum of \$150, death benefits, under the constitution and by-laws of the defendant. The defense was that the intestate was not in "good standing" under the by-laws, because his dues were not paid promptly at the time therein specified for the payment, although it was admitted that at the time of the death of the member nothing was owing by him to the defendant, the deceased having in his lifetime paid all his dues. It was also claimed that as the charter of the defendant limited the funeral benefits to one hundred dollars, it was *ultra vires* for the corporation to agree in its constitution and by-laws to pay any sum in excess thereof.

Held, that a by-law forfeiting the funeral benefit in case a member's dues, although fully satisfied, are not paid at the precise time required by the lodge, is unreasonable, illegal and void, and no bar to a recovery.

That the amount of benefits must be limited to that authorized by the charter, and cannot exceed the sum therein fixed notwithstanding the by-laws provide for a much larger one.

Jacobs Bros., for plaintiffs.

John R. O'Donnell, for defendant.

McADAM, Ch. J.—The contention is that in order to make the defendants liable for the benefits promised in and by article XI., section 1 of its constitution, the

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deceased must not only have been a member of the defendant's Union for one year immediately preceding death, but must have been "continuously in good standing" for six months immediately preceding thereto as well—that, having failed to pay his dues for May and June, 1885, on or before the first day of the next succeeding month, as required by article X., section 1, of the constitution he "lost his good standing in the Union," and did not therefore come within the meaning of article XI., providing for the payment of death benefits to the families of deceased members "continuously in good standing for six months immediately preceding death." In other words, that although the subsequent receipt of his dues left the member in good standing for the ordinary business purposes of membership, the failure to pay in time operated as a forfeiture of his "good standing" in case of claim by the family for death benefits. The language of the articles cited (X. and XI.) gives plausibility to this contention, and leads to the inquiry whether such a provision for forfeiture made by a corporation is legally binding upon its members, and whether its effect in case of death is to deprive the family of the promised benefits. The question is not new, for it has more than once received judicial consideration, and all this court is required to do is to follow the determination reached in those cases after intelligent argument and deliberation. In *Gunlach v. Germania Mechanics' Association* (4 *Hun*, 341), the court said: "The constitution and by-laws of a benevolent society should have a liberal interpretation for the purpose of promoting the general objects of the society," which are benevolence and charity.

But the by-laws of a corporation to be valid must be consistent with the charter, and must not be unreasonable (*Field on Corp.* § 296; *Angell & A. on Corp.* §§ 345-352). The charter authorizes the defendant to provide by contribution a sum not to exceed \$100 to defray funeral expenses, and the defendant under its charter and

by-laws should, to the extent of \$100, make the expenditure good. The intestate was a member of the Union, he had paid his dues, and the Union accepted the sums delivered as in payment and adjustment of them. This court in *Bueking v. Robert Blum Lodge*, 1 *City Ct. R.* 51, following *Carten v. Father Mathew U. B. Soc.*, 3 *Daly*, 20, held that "the governing rule with regard to corporations is that their by-laws must be reasonable, and all those which are vexatious, unequal, oppressive or manifestly detrimental to the interests of the corporation or its members are void," and concluded by holding that a by-law like the present, operating as a forfeiture of benefits, after the corporation had accepted all the dues in arrear, was inoperative as a forfeiture, and that the beneficiary was entitled to recover. These decisions are based on sound grounds of public policy, and find ample warrant and support in the law. There is no reason why the Union after taking the dues from their deceased brother should decline to give him proper burial, simply because he was a little behind time in making the agreed payments. The mantle of charity should be thrown over his shortcomings, and the fact that he was not on hand the very day appointed to pay his month's dues, but paid them shortly afterward, should not deprive him of the last sad rites of burial, which a fraternal spirit of brotherhood should suggest, and which a court, on the contract contained in the by-laws liberally and legally interpreted, must require. Corporations are creatures of the statute, and must conform to the law of their creation, and their by-laws must harmonize with the laws of the land, as interpreted by the courts, and if they transcend these they are to that extent void—as much so as if the illegal portions of them had never been enacted. The general scheme of benevolence holds good, but the illegal condition is eliminated from it. Disregarding, as the courts do, the illegal forfeiture, it follows that after receiving the member's due in full, the delinquent member is restored

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to "good standing," not for business advantages only, but for all the fraternal and benevolent purposes of the order, and the legal portion of the contract as to death benefits is enforceable by the plaintiffs as the family of the deceased member, and the designated beneficiaries, under the plan provided for relief benefits. The obligation, however, is only enforceable to the extent of \$100—the sum designated in the charter—the organic law of the order, the spirit which called it into being and gave it legal life and existence. The promise to pay \$150 is commendable and generous, but is in conflict with the limitation imposed by the charter. Whether the doctrine of *ultra vires* could be enforced against a stranger so as to defeat the agreement as to the amount contained in the contract, need not be considered (see 22 *N. Y.* 264, 269, 506; 7 *Wend.* 31; 97 *N. Y.* 381); for I hold that it may be enforced against the legal representative of a member, who as such, is, according to legal principles, chargeable with a knowledge of what the charter, the organic law, contains.

Upon this ground, the plaintiffs' recovery must be limited to the amount permitted to be paid by the charter, viz.: \$100. This interpretation as to the extent of the defendant's liability is certainly one of which they cannot complain, because it merely enforces the contract obligation of the defendant construed with reference to the charter under which it works (see 97 *N. Y.* 381; 4 *Hun.* 339).

Returning again to the subject of forfeitures which take from members and their families pecuniary rights and remedies, it is proper to remark that forfeitures are frequently relieved against and seldom enforced. The law, in its endeavor to deal out justice, looks to the substance of the contract, and opposes subtle technicalities which stand in the way of doing what is regarded as the fair even thing between man and man. The punishment should fit the crime, and not go beyond it. Technical

offenses are not to be treated like high crimes and misdemeanors, nor is a technical violation of a by-law, atoned for by the member and condoned by the society, to lower the status of a delinquent brother, who in his lifetime did everything required to make good the delinquency, and to restore himself to good fellowship in the order among those respected by him as craftsmen and friends in his chosen walk of life.

The law takes this charitable and rational view of such things; and if this just mode of interpretation is to be applied to any class of contracts, I know of none to which they can be more appropriately applied than to those contained in the by-laws of benevolent societies, whose watchwords are typical of faith, hope and charity, and in which the mantle of death should command silence over the grave of a dead brother whose only offense was a few days' delay in paying a monthly stipend of fifty cents.

This short delay in payment, caused, perhaps, by impecuniosity or illness, worked no hardship to the Union nor to any of the brothers composing it.

The Union may say, if this is so, how are we to enforce discipline? This question is easily answered: by suspending the delinquent brother from benefits during his delinquency, and if that continues too long, expel him from the order, and all duties owing from one to the other cease.

But if he pays his arrearages and the order receives his money it cannot call him an unworthy brother, nor can it deprive him of the rights which follow membership, and a by-law which deprives him or his family of benefits thereafter for the technical prior default, fully atoned for and satisfied, is in the nature of confiscation, and is so inequitable and unreasonable that no court of justice can put upon it the seal of approval.

The delinquency is trivial, the punishment absolute forfeiture or confiscation. Apply the rule to property mat-

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ters and the impracticability of such a by-law is apparent. If a property owner does not pay his taxes at the appointed time he may be charged interest upon the default, and his lands may be ultimately sold; but would any one contend that a law providing for "absolute forfeiture" of the entire property for the technical failure to pay on the very day named would be a reasonable exercise of legislative authority? I think not.

This would be called confiscation—a right only exercised in time of war, as a military necessity, and as a means of punishing and subduing an enemy or those in sympathy with the belligerent power.

Except when exercised as a war measure courts would intervene and protect rights of property from legislation so unjust and far-reaching. Rights must be reasonably respected, not arbitrarily destroyed.

The Typographical Union is a corporation and a law-making power, so far as the regulation of its internal affairs is concerned. It may make by-laws, with this limitation, that they must be reasonable and not oppressive. If it promises charity, it must give it without regard to technical defaults afterwards waived and satisfied by being made good.

The officers of the defendant in refusing payment acted conscientiously and according to the letter of their by-law, but the broad provision as to absolute forfeiture being, for the reasons aforesaid, void, no longer excuses them for withholding from the family of their dead brother the burial sum which forms one of the many commendable features of their organization.

Upon the entire case, therefore, I find and decide that the plaintiffs are entitled to judgment for \$100 and interest, making together \$100.80, with costs.

The Law of Mutual Associations.

Mutual Benefit Associations are rapidly increasing. The law governing them is becoming settled by legal decisions. In settling the

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rights of interested parties in these associations, the courts consider them as representing life insurance companies, and have uniformly treated them as such in substance (*May on Ins.* 2 ed. § 550 a; *Dennett v. Kink*, 59 *N. Y.* 10; *Commonwealth v. Wetherbee*, 105 *Mass.* 149).

The Illinois statute is very broad, and includes as beneficiaries, "widows, orphans, heirs or relatives by consanguinity or affinity, devisees or legatees of deceased members" (1 *Starr & Curt. Stat.* 1848. § 122). This statute is broad enough to include strangers as beneficiaries in the persons of devisees and legatees. In Ohio the statute provides "for the mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of deceased members." Under this provision, the Ohio benefit associations cannot issue certificates of membership payable to the named beneficiary or "assigns" (*State v. Association*, 18 *Week. L. Bull.* 854). And if a member make a bequest of the proceeds of his certificate of membership to a stranger, it does not constitute such beneficiary an "heir" of the testator, and such certificate is void (*National Mut. Aid Assoc. v. Gonser*, 18 *Week. L. Bull.* 445; *State v. Moore*, 38 *Ohio St.* 7; *State v. Standard Life Asso.*, 38 *Id.* 281; *State v. Cont. O. Mut. Bal. Assoc.*, 29 *Id.* 399; *State v. People's Mut. Ben. Asso.*, 42 *Id.* 579). It was held in Ohio that a contract by a benefit association "to pay in case of a member's death to 'himself or assigns,' 'to his estate,' 'to his executors or administrators,' or to any person, whether a relative or not, who is not of his family or heirs, is against public policy and void (*State v. Standard L. Asso.*, *supra*). A class of beneficiaries cannot be created who are not contemplated nor authorized by the charter of an association (*State v. People's Mut. Ben. Asso.*, *supra*).

The Illinois charter seems to contemplate strangers as a class of beneficiaries, and the question arises, can a member make a stranger beneficiary in his certificate of membership? The Illinois benefit associations have answered this in the affirmative, by issuing such certificates and paying a stranger the proceeds on the death of a member.

The charter of the Knights of Honor provides that "any brother may cause to be entered upon the reporter's record book a direction to whom his benefit shall be paid." Under this it has been decided that a member may give the fund to any one he pleases, whether wife, relative or stranger (*Highland v. Highland*, 13 *Brad.* 510).

The member can change his beneficiary, but in making a change he must be controlled by the regulations of the association (*Kentucky Mut. Masonic Ins. Co. v. Miller's Adm.*, 13 *Bush*, 494).

When the certificate of membership designates as payees the "legal representatives," the fund becomes assets in the hands of the execu-

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tor, and can be used to pay debts of the deceased member (*People v. Phelps*, 78 *Ill.* 148). If this would divert the fund into a channel not contemplated by the charter, the certificate would be void (*State v. Standard Life Ins. Assc.*, *supra*).

The amount of the certificate must be paid to the beneficiary and not to the deceased member's personal representatives as assets (*Highland v. Highland*, 109 *Ill.* 866; *Richmond v. Johnson*, 28 *Minn.* 447; *Redmen v. Clendenin*, 44 *Ind.* 429).

Members have made changes of the beneficiary, as from daughter to wife (*Swift v. Conductors' Asso.*, 96 *Ill.* 309); from a lawful wife to a putative wife (*Durian v. Central Verein*, 7 *Daly*, 168); from a wife to a daughter (*Tenn. Lodge v. Ladd*, 5 *Lea*, 716).

But in making a change of the beneficiary, the substituted person must be of a class designated by the charter or prescribed by the by-laws (*Greeno v. Greeno*, 28 *Hun*, 478; *McClure v. Johnson*, 56 *Iowa*, 620).

When the charter makes the object of the fund to be for families or relatives, a stranger cannot be made a beneficiary (*Van Bibber v. Van Bibber* [Ky.], 14 *Ins. Law J.* 290). So when the charter provides that the fund shall go to the "legal heirs or beneficiaries" of the member, a stranger cannot be a beneficiary (*Weisert v. Muehl*, 81 *Ky.* 326). When the certificate of membership makes the fund payable to "the widow or heirs" it does not go into the deceased member's estate in the hands of the executor, but directly to the widow or heirs (*People v. Phelps*, *supra*).

The member cannot change the beneficiary by will, where the charter provides a different way (*Stephenson v. Stephenson*, 64 *Iowa*, 584; *Duvall v. Goodson*, 79 *Ky.* 224; *Arthur v. Benevo. Asso.*, 29 *Ohio St.* 557). It is a general principle, that the rules and regulations of a benefit association must be strictly followed in changing a beneficiary (*Aid Asso. v. Lupold*, 101 *Pa. St.* 111; *Hellenberg v. I. O. B. B.*, 94 *N. Y.* 580).

The beneficiary has no vested interest in the fund until the assured dies (*Splawn v. Chew*, 60 *Texas*, 532; *Aid Society v. Lewis*, 6 *Mo. App.* 412; *Richmond v. Johnson*, 28 *Minn.* 447). If the certificate is void, without fraud on the part of the applicant, and the company has run no risk for indemnity of the insured, the membership fee and assessments should be returned to the applicant (*Connecticut Mut. L. Ins. Co. v. Pyle*, 4 *N. E. Rep.* 465; *S. C.*, 15 *Ins. Law J.* 261). But if the policy is void *ab initio*, and there has been no fraud, the premium must be returned (*Tyrie v. Fletcher*, *Cowp.* 666, 668; *Delavigne v. United Ins. Co.*, 1 *Johns. Cas.* 810; *Anderson v. Thornton*, 8 *Beck. Rep.* 425; *May on Ins.* § 4). When the certificate is void, the prin-

ciple of estoppel does not apply to the company (*National Mut. Aid Ass. v. Gonser, supra*).

The Illinois statute, in stating what are not insurance companies, says: "Associations and societies which are intended to benefit the widows, orphans, heirs and devisees of deceased members, . . . and where no annual dues or premiums are required, . . . shall not be deemed insurance companies" (1 *Starr & C. Stat.* 620, § 31).

The Illinois supreme court defines an annual assessment as follows: "An annual assessment, as we understand the term, would require the payment of a specified sum each year" (*Commercial League v. People*, 90 *Ill.* 166). Under this definition, many of the benefit associations of Illinois are assessing "annual dues," which is in violation of their charter. It has been decided that assessments authorized by the by-laws "not to exceed \$20 in any one year to meet expenses of the association," are not annual dues (*Com. League v. People, supra*). But in this case there was not any sum certain, nor was the assessment to be made annually. The assessment was contingent. But if a company does make annual assessments, it lies with the State to correct the wrong, and not with the members. Nobody but the State can oust the association of its franchises.

In making assessments the companies generally send out the notices once a month, giving thirty days' notice stating that the certificate of membership will become forfeited if the amount is not paid within thirty days from date of notice. But it must be remembered that this means thirty days from the day following the receipt, at the member's post-office, of the notice, and not thirty days from the mailing of the notice at the home office (*Protection Life Ins. Co. v. Palmer*, 81 *Ill.* 88). So if the amount of the assessment is mailed within the thirty days to the home office, the certificate can not be forfeited on non-payment of assessment within thirty days. These associations can introduce new rules which are binding upon the members, inasmuch as the right of membership depends upon paying the assessments as called for, and each payment of assessments is equivalent to a new contract for insurance.—*Chicago Legal News*, April 24, 1886.

See also 22 *Cent. L. J.* 560.

Construction of Clauses Designating Beneficiary.

The certificate read: "all payments or benefits that may accrue or become due to the heirs of the person insured, by virtue of this policy, will be payable to Mrs. H. M. Case or lawful heirs."

At the time the certificate was issued to Case, he had a wife living by the name of Amelia M. Case, and a daughter by the name of Inez H. Case. The wife Amelia M. died September 12, 1878, and on Febru-

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ary 8, 1882, the insured remarried Emma Case, and on May 59, 1885, he died leaving her surviving. *Held*, that Amelia M. Case was the person intended by the designation, Mrs. H. M. Case, upon the certificate; that upon her death the designation lapsed as to her; and that the lawful heir of Case, his daughter Inez, became the person entitled to the beneficiary (*Day v. Case*, 48 *Hun*, 179).

Failure to Receive Certificate.

The plaintiff's intestate died without receiving the certificate provided for by the defendant's by-law. *Held*, that the lack of the certificate was fatal to a recovery (*Bishop v. Grand Lodge*, 48 *Hun*, 472).

By-laws must be Reasonable.

The supreme court of Pennsylvania, in *Lynn v. Vreemansburgh*, B. A. (54 *Phila. Legal Intel.* 462), per GREEN, J., in speaking of a by-law imposing a fine on certain members, said: "That it is unreasonable, extortionate, and oppressive to the last degree, must be at once conceded. If the monthly penalty were a hundred per cent. instead of ten, it would be only a difference in degree, not in character. Of course, if there is an unlimited right to impose, by means of a by-law, any amount of fine or penalty which the association may please to ordain, and the law is powerless to interfere, the results must be accepted, no matter how unjust or oppressive they may be. But we do not so understand the law upon this subject." And the court held: "The general rule that by-laws of corporations must be reasonable and must not be oppressive, on peril of invalidity, is such a familiar doctrine that a citation of authorities in support of it is unnecessary.

In *Endlich on Building Associations*, at § 271, it is said: "And all by-laws to be binding must be in conformity [1] with existing and supreme laws . . . ; [2] with the charter, its letter and spirit; [3] with reason and equity" (*Ang. & A. on Corp.* § 847). The same rule exists as to ordinances of municipal governments, as was held in *Kneeler v. Borough of Norristown* (4 *Out.* 368). For the reasons we have stated, we hold that the by-law of the plaintiff imposing ten per cent. penalty in question is unreasonable and oppressive, and therefore invalid and of no effect."

Unincorporated Societies.

A different rule applies to unincorporated societies (see 1 *City Ct. R.* 128).

The Common Pleas limits its previous Decision as to the Binding effect of By-laws.

In *Skelly v. Coachmen's B. & C. Society* (18 *Daily*, 2), the court holds that a by-law of an incorporated benevolent society, although

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unreasonable, and therefore void, as against members not assenting to it may be valid and binding as a contract by assenting members. Chief Justice DALY, in writing the opinion, says: "Although entertaining some doubt as to the correctness of the decision in *Curtan v. Father Matthew T. A. B. Society* (8 *Daly*, 22), I do not feel at liberty to disturb it."

Members Seceding from Lodge.

Members who voluntarily seceded from a lodge, and since refused to pay dues, premiums, or contributions thereto, have forfeited their endowment certificates or policies issued by it to each member, and all claim upon the fund by which payment of such certificates or policies was protected or secured.

Individuals who have left an incorporated society and formed a voluntary one, leave all rights and funds of the corporation, and cannot maintain a suit to recover the corporate funds, while the corporation remains entire and in full possession of all its rights (*Goodman v. Jedediah Lodge, No. 7, Ind. Order of B'Nai Brith, 8 Cent. Rep. No. 8*).

City Court.

Trial Term—March, 1886.

HALL'S SAFE & LOCK CO. against WILLIAM H. REIKE.

The plaintiffs, who do business at Paducah, Kentucky, sold to the defendant a fire-proof safe No. 87, for which he agreed to pay \$400 in cash and a second-hand safe then in the defendant's store at Cincinnati. The 87 safe was sent on to Cincinnati. The contract was made at the defendant's store in Cincinnati, and the delivery of the second-hand safe was to be made there. The plaintiff suffered the second-hand safe to remain in defendant's store until a fire occurred which destroyed the building and its contents, including the second-hand safe. The present action was to recover the value of said safe. *Held*, that title to the second-hand safe had passed to the plaintiffs, that the risk attends the title and not the possession, and that the defendant was not liable.

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McADAM, Ch. J.—The plaintiff has a place of business at Cincinnati, Ohio, and the defendant has a place of business at Paducah, Kentucky. On or about October 1, 1883, the plaintiff sold to the defendant a fire-proof safe, No. 87, for which the latter agreed to pay \$400 in cash, and, according to the allegation of the complaint, "to deliver to the plaintiff, at Paducah, Kentucky, upon the receipt by the defendant of said safe, No. 87, one second-hand safe, then in the possession of the defendant, and which the said defendant agreed to deliver to the plaintiff in good condition at Paducah aforesaid."

The plaintiff shipped safe No. 87 from Cincinnati to Paducah, Kentucky, where it was received by the defendant, who paid the \$400 in cash; but the second-hand safe, which the plaintiff was to get, remained in the defendant's possession until June 1, 1884, when it was destroyed, for all practical purposes, by a fire which took place in Paducah, and destroyed the defendant's place of business and building. The second-hand safe, it is contended, was worth \$200 prior to the fire, and the question presented is, whether the loss must fall upon the plaintiff or defendant, and its determination depends upon various points which will receive consideration in order.

The contract was made by the defendant in his store at Paducah, Kentucky, where the plaintiff was represented by Mr. Spillman, as traveling salesman. It was sent to the plaintiff's branch establishment in Louisville, Kentucky, where it was approved, and the No. 87 safe came on from the plaintiff's establishment at Cincinnati. Spillman, the salesman, cannot be found, and in consequence was not produced. The plaintiff's only witness, B. Hollman, testified: "I was not present when Mr. Reike made the proposition, and not know personally anything that passed between them." The complaint, as before remarked, alleges that the defendant was to "deliver the second-hand safe at Paducah, Kentucky," and this is what the law would imply, as the safe in question was there

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and the contract was made there. The elementary writers lay it down as law, that "if no place be designated by the contract, the general rule is, that the articles sold are to be delivered at the place where they are at the time of the sale. The store of the merchant, shop of the manufacturer or mechanic, and the farm or granary of the farmer, at which the commodities sold are deposited or kept, must be the place where the demand and delivery are to be made, when the contract is to pay upon demand, and is silent as to the place."

This appears to be the general doctrine on the subject (2 *Kent Comm.* 505; *Hilliard on Sales*, 217, § 3; *Story on Sales*, 308). The second-hand safe was sold and paid for when the new safe No. 87, was delivered to the defendants. It was a consummated sale, and not a mere executory agreement to sell. Thus, in *Terry v. Williams*, 25 *N. Y.* 520, "An agreement, by the vendor of chattels, to transport them to a place named for delivery, was held not to render executory a contract of sale, otherwise completed on his part. Accordingly, where, on a sale of lumber then in the vendor's yard, the pieces sold were selected and designated, and the price paid, but the vendor agreed to deliver the lumber at a railroad station, the lumber being destroyed by fire before such delivery, it was held that the loss was that of the purchaser." The risk, it appears, attends upon the title and not upon the possession, where there is no special agreement upon the subject (*Tarling v. Baxter*, 6 *B. & C.* 360; *Willis v. Willis*, 6 *Dana*, 49; *Hinde v. Whitehouse*, 7 *East*, 558; *Joyce v. Adams*, 8 *N. Y.* 296, 2 *Kent Comm.* 492-496; *Noy's Maxims*, 88).

The correspondence between the plaintiff and defendant will be considered in order and commented on as it proceeds. The letter written by defendant, under date of January 3, 1884, says: "We have not shipped the old safe to you yet, because Mr. Flournoy, of this place, went to Louisville to try and buy it from you. If you do not

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make a trade with him, let us know and we will ship it, as we have failed to find any other party who wishes the safe." The latter portion of this letter gives color to the idea, that the safe was to remain with the defendant on sale, for they express a desire to get rid of it on account of their inability to sell, and the fact that Mr. Flournoy wanted to purchase the safe, was given as an excuse for not shipping it before. If Spillman had been produced, and had testified that the defendant agreed to ship the safe to the plaintiff, the excuse for not shipping might be regarded as strongly corroborating his story, but it has not in itself sufficient weight to overcome the positive oath of the defendant and his witness, that no such condition was attached to the contract of sale.

The letter written by defendant, under date of February 4, 1884, is of the same tenor, and is subject to the same comment. It reads: "We have not been able to dispose of the safe you left with us. We have had several parties to look at it, but the only offer was from T. J. Flournoy, who offers \$100 for it. If you don't wish to sell it at this price, please notify us where to ship it, as it is in our way." This letter also implies that the old safe was left with the defendant on sale, and that he did not know where to ship it, or in other words, that he did not know where it was to be shipped, nor to whom.

The letter written by defendant, under date of May 28, 1884, reads: "We wish you to advise us what we must do with your safe. We have no sacking, and do not know whether it would injure to ship without covering; let us know immediately where we must ship it to."

The letter written by the plaintiff to defendant, under date of December 28, 1883, reads: "P. S. If you know of no one in Paducah who will give you about \$200 cash for your old safe, please ship it to us, and much oblige, etc." This gives coloring to the idea of sale in Paducah, and to the idea that there was no contract by the defendant to ship the safe, for the plaintiff does not write, "ship

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according to contract," but "please ship and oblige," putting it on the ground of courtesy rather than as a demand of a strict contract right. The letter written by the plaintiff to defendant, under date of May 24, 1884, reads: "Please ship old safe in your possession to us. We enclose shipping tag. Get lowest through rate by rail, etc. Your prompt attention will much oblige, etc." No demand as of right under contract was made, but the request was "to please ship," and "oblige, etc."

The letter written by the plaintiff to defendant, under date of May 30, 1884, is of the same general tenor as that of May 24, and does not refer to any contract obligation to ship, and concludes by giving definite shipping directions. This letter was written on the 30th, and whether received before or after the fire, was so close to it that a reasonable time had not elapsed between the time of its receipt and the fire, to charge the defendant with neglect to ship, if he could be charged at all by a letter written long after the sale was consummated. These letters are not inconsistent with a contract to "ship" but do not prove one. The defendant, not having agreed, as part of the contract of sale, to ship the old safe, was under no obligation to do so. His subsequent promise to ship was therefore gratuitous, and the excuse he furnishes is sufficient to justify a gratuitous bailee in not shipping the safe as quickly as an agent, who, by the nature of his employment, and the confidential character of his trust, must obey the lawful commands of his principal with speed and alacrity or be visited with any misfortune which may ensue in consequence. The defendant owed no such duty; the service he volunteered to perform was one which he might discharge at his reasonable convenience.

Upon the entire case, therefore, I find and decide that the defendant is entitled to judgment, with costs.

Walsh v. Bowery Savings Bank.

City Court.*Trial Term—March, 1886.***MARY WALSH *against* THE BOWERY SAVINGS BANK.**

A deposit in a savings bank may be transferred by delivery of the bank-book with intent to pass the title.

A notice to an agent which his duty requires him to communicate to his principal is notice to the latter.

Motion for judgment on special verdict.

Wm. H. Regan, for plaintiff.

Norwood & Cogswell, for defendant.

McADAM, Ch. J.—The main question involved was whether Mary Duffy, who opened account No. 546,069 with the defendant, made a valid gift and transfer of the deposit to the plaintiff, so as to confer upon her the legal title to the money.

This question was submitted to the jury:

Q. "Did Mary Duffy deliver the bank-book to the plaintiff with the intention of passing title to the fund on deposit?"

To which the jury answered "Yes."

This finding upon the evidence put legal title in the plaintiff (*Risley v. Phoenix Bank*, 11 *Hun*, 484; *Vandermark v. Vandermark*, 55 *How. Pr.* 408; *Cornell v. Cornell*, 12 *Hun*, 3. 12; *Coates v. First Nat. Bk.*, 91 *N. Y.* 20; 17 *Weekly Dig.* 262, 415; 11 *Johns.* 534; 17 *Id.* 284; see cases collated in 2 *Bliss Code*, 252).

Mary Duffy died February 12, 1883, and was buried on

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the 14th. On February 15, 1883, the plaintiff went to the bank and saw the bookkeeper in charge. She presented the book, said it was given to her by Mrs. Duffy, and demanded the money, and the bookkeeper said she must go to the surrogate's court first.

This was sufficient notice of the transfer to charge the bank, for the bookkeeper was specially charged with the paying of money to depositors, and, it being in the line of his agency, the information was of a character which it was his duty to communicate; and this seems to be the test in determining whether the information given to him operates as notice to his principal (*Wharton on Agency*, §§ 178, 673; *Story on Agency*, § 140).

Notwithstanding this notice, the bank subsequently paid the money on deposit to the administrator of the depositor.

The bank-book was in the possession of the plaintiff at the time the deposit was paid over to the administrator, and the money was so paid without requiring the surrender of the book, which, according to article VI. of the rules and regulations printed in the bank-book, is the evidence of the property of the depositor in the bank.

Under these circumstances, the plaintiff is entitled to judgment on the verdict for \$125, with costs, and five per cent. allowance.

Gifts Causa Mortis.

To constitute a valid gift in view of death, it must appear: 1. That the gift was made with a view to the donor's death from present illness or from apprehended peril. 2. The donor must die of that ailment or peril. 3. There must be a delivery of the subject of the gift (see cases collated in *Redfield Surr.* 3 ed. 496 *et seq.*). To give effect to the gift there must be a present delivery and parting of possession and dominion over the subject of the gift (*Turner v. Brown*, 6 *Hun*, 331; *Grymes v. Hone*, 49 *N. Y.* 17; *Curry v. Powers*, 70 *Id.* 212. And see *Glynn v. Seaman's Savings Bank*, 9 *St. Rep.* 499).

O'Connor v. Gouraud.

City Court*General Term—April, 1886.***LAWRENCE O'CONNOR *against* ANDREAS H. GOURAUD.**

Where the landlord covenants to repair and does not, the tenant must either make the repair at the landlord's expense or recoup the diminution in value of the premises. He cannot omit the repairs and hold the landlord for damages resulting from injury to his goods by a rain storm.

Appeal from order setting aside verdict in favor of the plaintiff and directing judgment for defendant.

McADAM, Ch. J.—It was conceded on the trial that the rent claimed was due, and the only defense presented was that contained in the counter-claim, pleading the landlord's failure to make the necessary repairs to the roof. The rent amounted to \$84, and it was admitted that "the amount the defendant claims, which is \$84, was the amount of damage to the goods," done by a rain storm. The question presented is whether this loss is recoverable by the defendant as lessee, for breach of the landlord's covenant to repair.

The general rule of damages for breach of contract, is to allow those "which were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties, at the time of the contract" (*Hadley v. Baxendale*, 9 *Exch.* 341; S. C., 26 *Eng. L. & E.* 398). In view of this rule, it becomes necessary to inquire what damages enter into the contemplation of the parties, in making a covenant to repair.

In actions on covenants of this nature, it was said by

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Lord Holt, in an early case: "We always inquire in these cases what it will cost to put the premises in repair, and give so much damages" (*Vivian v. Champion*, 2 *Ld. Raym.* 1125).

If a tenant covenants to repair and does not, and the landlord in consequence makes the repairs, the measure of damages will be the cost of such repairs so far as they are fit and necessary (*Wood's Mayne on Damages*, 334), or the landlord may omit making the repairs and recover to the extent the reversion is injured by the tenant's breach (*Id.* § 332).

On the other hand, if the landlord fails to repair agreeably to his covenant, the tenant may either make the repairs at the landlord's expense or charge the landlord with the diminished value of the premises in consequence of the want of them (*Myers v. Bruns*, 35 *N. Y.* 269; *Cooke v. Soule*, 56 *Id.* 420).

No repairs were made by the defendant and no diminution in value of the premises was alleged or proved.

The defendant's contention is that because the repairs were not made the rain came in and damaged his goods, and that he is entitled to recover this damage from the landlord irrespective of what it would have cost to make the repairs. In other words, if the repair,—*i. e.*, stopping a leak,—might have been made, at the cost of one dollar, the tenant may leave it undone, and charge the landlord whatever damage the rain may in consequence do to his goods, without limit to the amount.

A doctrine so inequitable can hardly find sanction in the law. It is the tenant's own fault if he fails to use reasonable efforts, care and diligence to protect himself from injury or loss; and where he fails to do so, he will not be permitted to say that the loss that might have been thus avoided was caused by the wrong of the landlord; for it is against the policy of the law, as well as common principles of justice, to permit a party to reap any advantage from his own negligence or want of ordinary care,

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or from his own wrong, or from his own and another's neglect or wrong. In such cases the maxim "nullus commodum capere potest de injuria sua propria" applies; and the rule is applicable in cases of contracts as well as in torts (*Field on Damages*, § 126).

In *Cook v. Soule* (56 *N. Y.* § 423) the court, per GUYER, J., said: "In cases where the requisite repairs are trifling and the damage by not making them is large, I think it is the duty of the tenant to make them and charge the landlord with the cost" (citing *Miller v. Mariner's Church*, 7 *Green*, 57; *Laker v. Damond*, 17 *Pick.* 284). To substantially the same effect are *Walker v. Swayzee* (3 *Abb. Pr.* 136) and *Flynn v. Hatton* (43 *How. Pr.* 333).

By the rule suggested no injustice is done to either party, the covenant is made good, the tenant is fully reimbursed, and on the other hand the landlord's property is benefited to the extent of the expenditure.

In *Makin v. Wilkinson* (3 *Abb. L. J.* 196), the court of exchequer held that as the condition of demised premises is a matter within the knowledge of the tenant in possession, and not of the landlord, the latter is entitled to notice of the want of repair before he can be sued for breach of covenant, and so all through the books will be found rational principles on which rights are enforced, liabilities imposed and damages ascertained and measured. In *Walker v. Swayzee* (3 *Abb. Pr.* 138), the defendant undertook to make the repairs, but they were done imperfectly, and the landlord had notice from the mechanic he employed to do them that the mode of having them done was insufficient and improper, and it was on the sole ground of "negligence" that the tenant, who had the right to suppose the repairs were properly made, was allowed to recover for the damage done by the first rain thereafter.

That is not this case. There is no charge in the answer that the landlord undertook to make the repairs,

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and did them so negligently that damage followed. The allegation is that "the plaintiff failed and neglected to perform the aforesaid covenant on his part, but, to the contrary, wholly omitted and neglected to make all necessary repairs to said premises, and failed and refused to keep and perform the same." It then charges that the plaintiff "failed and refused to repair," whereby, etc.

Upon the pleadings and proofs the verdict which the trial judge directed in favor of the plaintiff was right, but the order which he subsequently made, setting aside the verdict and ordering judgment for the defendant, was erroneous.

The order appealed from must, therefore, be reversed, with costs, and the plaintiff will be permitted to enter judgment on the verdict originally directed in his favor.

HYATT, J., concurred.

Affirmed by New York common pleas, 3 *State Rep.* 555; same principle laid down in *Mayor v. Second Ave. R. R. Co.* (102 *N. Y.* 574).

Repairs.

When a landlord contracts with his tenant to attend to all the repairs necessary to the premises, he is only required to exercise due diligence in looking after the property, but he does not contract that the property shall in no wise be out of repair. New trial granted (*Frank v. Conradi, Supreme Ct. of N. J.*, Nov. 8, 1887). •

City Court.

Trial Term—April, 1886.

JOHN H. PLATT *against* JOHN BALDWIN.

Where a broker employed to sell real estate acts for both buyer and seller and the fact is unknown to his principals, he cannot recover for his services from either party. If, on an exchange of property, it be made known to all the parties, that the broker is acting as a middle

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man, and is to be paid by both sides, he may recover from both. If the agency be limited to bringing the parties together, and does not involve the duty of negotiating for either, he may recover from both, whether the fact that he was to be paid by both was known or not, as the mere bringing of parties together does not involve negotiation or call for the exercise of the broker's judgment or advice. Agents must act in the best of faith toward their principals.

MORRIS DAM, Ch. J.—A broker employed to sell land cannot recover compensation from both parties. Employment by one party is incompatible with employment by the other (*Watkins v. Cousall*, 1 *E. D. Smith*, 65; *Vanderpeel v. Kearns*, 2 *Id.* 170; *Dunlap v. Richards*, 2 *Id.* 181; *Pugsley v. Murray*, 4 *Id.* 245); and it makes no difference that the transaction is an exchange of lands, not a sale for cash (*Pugsley v. Murray*, *supra*; *Duryea v. Lester*, 75 *N. Y.* 442.; S. C., 8 *Weekly Dig.* 116). In the case last cited, the court of appeals held that where a broker employed to sell real estate acts for both buyer and seller, and the fact is unknown to his principals, he cannot recover for his services from either party. That case was for brokerage on effecting an exchange of personal property for real estate. It lays down the broad rule that where the double agency is unknown to his principals, it is a breach of the agent's implied contract with each to use his last efforts to promote the interests of his principal, and operates, or is likely to operate, as a fraud upon both and the law will not in such a case enforce the contract for compensation, irrespective of the consideration whether the sale made was or was not advantageous to the party from whom compensation is claimed. This objection is especially pleaded in the answer, and is one the court is bound to notice. The exception to the rule is, that if, on an exchange of property it is made known to all the parties that the broker is acting as middleman, and is to be paid by both sides, and this is understood as one of the conditions of the employment, then the principals are apprised in advance of the broker's status, and his conduct cannot operate as a fraud upon either, and in such

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a case a recovery is permitted from both (*Rowe v. Stevens*, 83 *N. Y.* 621). The complaint alleges an employment by the plaintiff to procure a customer for the defendant's farm, and that acting under this employment he found a customer in one Margaret O'Sullivan. The evidence proved that he was already in O'Sullivan's employ, and that there was no notice to the principals bringing home knowledge of this fact. No recovery can be had under these circumstances (See cases before cited). The pleadings and proofs do not show that the plaintiff was a mere middleman, who was to bring parties together, leaving them to make their own contracts, as appeared to be the case in *Siegel v. Gould* (7 *Lans.* 177), and in *Fritz v. Finnerty* (10 *Cent. L. J.* 487). If the extent of the agency be limited to bringing the parties together, and does not involve the duty of negotiating for either, the agent is termed a "middleman," and may contract for and receive pay from both (10 *Cent. L. J.* 488). But if the agency be not so limited, and the employment involves, as it generally does, the duty of negotiating for his principal, the agent can not serve two masters with adverse interests without informing each of the fact, that they may know to what extent they may safely confide in his advice and follow his judgment. Upon the pleadings and proofs, the complaint was properly dismissed, and the motion for a new trial must be denied. See also as maintaining same principle: *Carman v. Beach*, 63 *N. Y.* 97; *Hoyt v. Howe*, 2 *Weekly Dig.* 177; *King v. Parr*, 4 *Alb. L. J.* 44.

Good Faith required.

An agent is held to the utmost good faith in his dealings with his principal. If he acts adversely to his employer in any part of the transaction, or omits to disclose any interest which would naturally influence his conduct in dealing with the subject of the employment, it is such a fraud upon his principal as forfeits any right to compensation for his services (*Murray v. Bland*, 102 *N. Y.* 505). An agent may not act in such a transaction where he has an interest or employment adverse to his principal (*Id.*).

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A real estate broker's commissions are earned whenever he has procured a buyer who will comply with the conditions fixed by his principal for the property proposed to be sold. But it is to be understood that this rule depends not only on the fact that the broker is to be regarded as the agent of the seller, but that as such agent he acts with the utmost good faith towards his principal; and if he does not so act, he is entitled to nothing.

A broker made an offer to the owner of real estate of \$135,000 for the property, when he actually had an offer of \$140,000, which he did not disclose to the owner, or give the name of the party who actually wanted the property. *Held*, that the owner was justified in refusing to acknowledge him as his broker, and declining, on the sale of the property, to pay him any commissions. The court, per GORDON, J., said: "It does not require the discernment of a very acute *casuist* to perceive that it was Pratt's duty to submit this whole matter to Patterson, and allow him to determine whether he would prefer as a purchaser the responsible or irresponsible party; whether he would accept the bond and mortgage of Natt rather than those of Harding. Good faith forbade the concealment of an arrangement intended for the advantage of the buyer rather than that of the seller" (*Pratt v. Patterson*, 17 *Pittsburg Legal J. N. S.* 158).

An agent cannot deal validly with his principal in any case, except upon showing the most entire good faith, a full disclosure of all facts and circumstances attending the transaction, and an absence of all undue influence or imposition (*Comstock v. Comstock*, 57 *Barb.* 458). Transactions which would be held unobjectionable between other parties, are often held void if between persons occupying confidential relations (*Id.* See also *Story on Agency*, § 182). In *Howell's Evans on Agency*, p. 298, paragraph *f*, the author says: "Very little need be said of the necessity incumbent upon an agent to act in good faith. The agent's position is one of trust, and as will be seen hereafter, no agent will be allowed to take any advantage of his position to the detriment of his principal."

Double Dealing.

Where one induces A. to employ him as an agent to negotiate a contract with B., concealing the fact that he is already employed by B. to negotiate with A., B. cannot enforce a contract into which A. is thus induced to enter (*Cassard v. Hinman*, 6 *Bow.* 8). The rule is that a broker cannot act for both parties (*New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 *N. Y.* 85; *National Ins. Co. v. Toledo Ins. Co.*, 17 *Barb.* 132; *Claffin v. Farmers' and Citizens' Bank*, 25 *N. Y.* 298; *Carman v. Beach*, 63 *Id.* 97; *Story on Agency*, §§ 81, 210, 212, 214).

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Agent Cannot Act for Himself.

An agent undertaking a special business for another cannot, on that subject, act for his own benefit to his principal's injury. If he does, he will be held as trustee for the principal in respect to any beneficial result (*Safford v. Hynds*, 89 *Barb.* 625. And see 1 *Johns. Ch.* 894; 5 *Paige*, 650; 86 *Barb.* 849; 82 *Id.* 9; *Story on Agency*, §§ 9, 10, 210, 211).

Nor can the agent purchase on his own account (*Torrey v. Bank of Orleans*, 9 *Paige*, 649; *aff'd*, 7 *Hill*, 280. And see 3 *Sandf. Ch.* 60; 5 *N. Y.* 256; 52 *Id.* 312; 56 *Id.* 285; 64 *Id.* 440; *Story on Agency*, §§ 210, 211).

Adverse Interest of Agent.

The court of appeals, in *Murray v. Beard* (2 *N. Y. St. Rep.* 467) said: "The plaintiff, while assuming to act for the defendants in obtaining the contract of sale, was, in fact, under equal obligations to competing dealers, to assist them in effecting the same sale. Thus, if the plaintiff's services could have been of advantage to any one, he was under the necessity of being treacherous to one employer or another. An agent is held to *uberrima fides* in his dealings with his principal, and, if he acts adversely to his employer in any part of the transaction, or omits to disclose any interest which would naturally influence his conduct in dealing with the subject of the employment, it amounts to such a fraud upon the principal as to forfeit any right to compensation for services (citing *Story on Agency*, §§ 81, 884; *Story Eq. Jur.* § 815; *Ewell Evans on Agency*, 268; *Dunlap Paley on Agency*, 105, 106; *Carmen v. Beach*, 68 *N. Y.* 97, 100). It is an elementary principle that an agent cannot take upon himself incompatible duties and characters, or act in a transaction where he has an adverse interest or employment (*New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 *N. Y.* 85; *Ewell Evans on Agency*, 14; *Greenwood v. Spring*, 54 *Barb.* 375; *Neuendorff v. World Mut. Life Ins. Co.*, 69 *N. Y.* 389). In such a case he must necessarily be unfaithful to one or the other, as the duties which he owes to his respective principals are conflicting, and incapable of faithful performance by the same person."

Prof. DWIGHT, in his *Notes on Contracts* (8 *Columbia L. Jur.* 116), says: "An agent holds a fiduciary relation toward his principal. It is a deduction from this proposition that he cannot put himself in a position adverse to that of his principal. Accordingly, if he is employed to buy, he cannot sell; and this is true, even though his act be a mere friendly one, and he sells at the market price and with entire fairness (*Conkey v. Bond* 34 *Barb.* 276; *aff'd* in 86 *N. Y.* 477). So if the agent has instructions to buy of another at an auction sale, he can-

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not, even though there be bids above the instruction price, buy for himself (see *Moore v. Moore*, 5 *N. Y.* 256).''

Liabie for Want of Diligence.

An agent's omission to exercise skill and diligence in the performance of a duty undertaken for his principal, renders him liable for resultant damages, even if he act in good faith and without intention to defraud (*Heineman v. Heard*, 50 *N. Y.* 27; *Whitney v. Martine*, 6 *Abb. N. C.* 72).

When Brokerage Earned.

When a broker employed to effect a sale of property, has found a person of sufficient responsibility willing to take upon the terms named, he has performed his contract and is entitled to his commission (*Duclos v. Cunningham*, 102 *N. Y.* 678). The broker need not disclose the name of the purchaser unless required (*Id.*). Upon the question of procuring cause and when brokerage is earned, see *Barnard v. Mannot*, 3 *Keyes*, 203; *S. C.*, 33 *How. Pr.* 410; *Sussdorf v. Smith*, 55 *N. Y.* 319; *Mooney v. Elder*, 56 *Id.* 238; *Smith v. McGovern*, 65 *Id.* 574; *Sibbald v. Bethlehem Iron Works*, 88 *Id.* 878. As to which of two brokers is the procuring cause, see *Martin v. Rillings*, 2 *City Ct. R.* 86.

A case on broker's commissions does not often get into the court of appeals. The decision in *Jarvis v. Schaefer*, 7 *Cent. Rep.* 675) sustains a broker's claim on several points. First, that one not the owner (in this case the husband of the owner), but acting as agent in employing a broker, will be personally liable for the commission if he engages to pay one; and, what is more important, that an undertaking to be personally bound may be inferred from the fact that he promised personally, without any qualification, even though the fact of his agency was known to the broker.

On another point the court held as follows:

"While it may be difficult for a broker to serve, with equal efficiency, two masters, neither of them can complain nor refuse compensation if it was promised when fully informed that his agent held the same relation to the adverse dealer; especially when the principals agreed upon the terms of sale and neither of them was prejudiced by the real character of the broker.

"That defendant paid full commissions to another broker does not impair the plaintiff's right to compensation for services actually rendered in pursuance to a valid contract."

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Right of Real Estate and Loan Brokers to Commission.

The right depends upon the contract with the employer; therefore may rest upon contingencies, as well as the conditions in the contract. If it be to furnish a purchaser, the commission is earned when a purchaser, able and willing to buy on the terms proposed, is found by the broker and introduced to the vendor. If the insolvency of the purchaser be relied on as a defense, that must be specially pleaded and proven, and plaintiff must show that the purchaser was willing to accept the contract in its exact terms. The refusal of purchaser to complete the contract because of defective title, is no defense. If there be no contract, no commission will be allowed, no matter how instrumental the broker may have been in bringing about the sale or purchase. Where the authority is revoked before a sale is effected, the right to remuneration for what he has done depends on the terms of his employment.

A broker employed to sell lands on certain terms, showed them to a person who negotiated wholly with the owner, who did not know that the party had any connection with the broker; the owner, when the negotiations began, having suspended the authority of the broker, the owner sold the land to the party on lower terms than those offered by the broker. *Held*, that no commission could be recovered. If the principal permits the agent to proceed with his search for a purchaser until he finds one, without notice that he is discharged, or that himself has effected sale, he will be liable for commission. After a purchaser is found, the principal cannot discharge the agent and complete the transaction himself, so as to deprive the agent of his commission (*Richards v. Jackson*, 81 *Md.* 250, and a large number of English and American authorities).

A broker is not entitled to commissions for unsuccessful efforts; his reward comes only with success. A principal, after he has placed his property in a broker's hands, may sell it himself to a purchaser not procured by the broker, and will not be held for commissions, unless he contracted so as to be so liable. The principal cannot captiously refuse to complete sale or purchase to one procured by the broker who agrees to the terms. The broker must comply with the terms of his contract, however onerous. If a broker act for both parties fairly and openly, and all the facts are known to both, he may recover commissions from both. A broker is regarded as a "middleman," and not as an agent in whom peculiar trust and confidence are placed. These cases often arise in exchanges of properties, where several brokers are employed separately to sell the same property, and each separately calls attention of a purchaser to it; the one first effecting the sale is entitled to commission, and the others are not. If the broker becomes

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the purchaser, or is a shareholder in a company which purchases, he is not entitled to commissions; such conduct could not be said to be in good faith; even if he offer himself as purchaser, alone or with another, it must be clearly shown that in such case the owner agreed that he should have a commission. If his clerk buy the real estate, he will be held as trustee for his principal. If a broker's contract is to produce a purchaser, it is no part of his duty to negotiate the sale. If employed to secure a loan, the broker has a lien on the money secured for his commissions. If by statute a license is required, and he have no license, the broker cannot recover. Broker's fees fixed by statute cannot be enlarged by contract. This article is by Wm. Thornton, and is very full of citation, as well as liberal quotation of authority (26 *Am. L. Reg. N. S.* 545. See also a valuable article on this subject in *Id.* 106, 109).

Set-off against Undisclosed Principal.

In the notes of cases, prepared, we believe, by FREDERICK POLLOCK, in the current number of the *Law Quarterly Review*, July, 1887, vol. 3, p. 358, the principle of contract with an agency is thus discussed:

"Cooke v. Eshelby (12 *App. Cas.* 371), is a case which excites comment. It determines that where an agent sells goods for an undisclosed principal and afterwards the principal sues the buyer for the price of the goods, the buyer cannot set off a debt due from the agent, unless he, owing to the action of the principal, positively believed at the moment when the contract was made that the agent was selling on his own account. The rule we conceive has hitherto been supposed to have been correctly stated in the following passage taken from *Dicey on Parties to an Action*, 142, 143:—'T. [a third party] contracts with A., the agent of P., under circumstances which make it possible for an action to be brought either by P. [the principal] or by A. An action is brought by P. T. can set off against a debt claimed by P., any debts due from P. to T. If T. supposed A. to be contracting as principal, he can also set off debts due from A. to T. If T. knew that A. was contracting as an agent, even though T. did not know that he was contracting as an agent of P., and *a fortiori* if T. knew that A. was contracting as agent of P. T. cannot set off debts due from A. to him. The House of Lords now in effect adds that T. cannot set off such debts if he had no belief whether A. was an agent or not.' No doubt this may be a legitimate deduction from the decided cases. Its weak point is that it carries a step further the results of an anomaly. The plain truth ought never to be forgotten that the whole law as to the rights and liabilities of an undisclosed principal is inconsistent with the elementary doctrines of the law of contract. The right of one person to sue another on a contract not really made with the person suing is unknown to every other legal system.

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except that of England and America. It rests originally on a sort of common law equity, and originates in the feeling that a principal who had got the advantage of a purchase ought to pay for it if the agent to whom the seller really trusted was not able to do so. Whether it was not from the first a mistake to suppose that the rights of a principal must of necessity be correlative to his liabilities is a question of some speculative interest. It is still more doubtful whether it be not inadvisable to extend by a process of judicial logic analogous rights which ought rather to be lessened than increased " (*Daily Register*; and see note to *Daly v. Monroe*, *ante*, p. 162).

City Court.

Trial Term—April, 1886.

THE BRADLEY FERTILIZER COMPANY *against*
FREDERICK G. LATHROP ET AL.

Where a creditor receives a check on a bank in payment of a debt, he takes upon himself the duty of presenting the check to the bank without unreasonable delay. If the creditor is guilty of unreasonable delay, and the bank fails in the meantime, the loss is on the creditor. But if the drawer of the check stops payment of it at his bank, the subsequent failure of the bank is no defense to him in an action on the check.

Motion for judgment on special verdict.

McADAM, Ch. J.—The finding by the jury that payment of the checks in suit was stopped by the defendant some weeks before the bank on which they were drawn, failed, determined the main question involved in this case and entitles the plaintiff to judgment on the verdict. The ordinary relation existing between a bank and its customer, if not complicated by any further transaction than that of the depositing and withdrawing of moneys by the customer from time to time, is simply that of debtor and

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creditor. The original and every subsequent deposit by the customer is, in strict legal effect, a loan by the customer to the bank and *e converso* every payment by the bank to, or on account of the customer, is a repayment of the loan *pro tanto* (*Morse on Banking*, 2 ed. 28). The bank becomes, to the extent of the money on deposit, the agent of the depositor, and must follow his directions as to honoring or refusing payment of checks or drafts. This contract is implied from the usual course of doing such business (*Id.* 37).

But the bank owes no duty to the holder of a check drawn upon it, and may refuse payment (even though the drawer has ample funds on deposit), without being liable to an action by such holder. This is because there is no privity between the holder and the bank, and the latter does not become a party to the check until acceptance or payment by it (*Ball on Nat. Banks*, 265), nor does a check upon the general fund operate as an assignment *pro tanto* to the payee, unless it has been accepted by the drawee (*Ib.*). Money deposited with a bank ceases altogether to be the money of the person paying it in; it becomes the money of the banker, who is to return an equivalent by paying a similar sum to that deposited with him, when he is asked for it (*Grant Law of Banking*, 3 ed. 2). Hence it is said that the relation between a banker and his customer is that of debtor and creditor only (*Id.* 5).

The receipt of a check is in itself no satisfaction of a debt until it is honored, and the holder may present it at any time within six years from its date; and if things have continued the same, and no damage has arisen from the delay in presentment, the drawer is liable on the check if it is dishonored, but if, before the presentment of the check, the banker on whom it is drawn has failed, or if by reason of the non-presentment of the check the position of the drawer, with respect to the fund on which the check was drawn, is altered for the worse and the check

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is consequently dishonored, the drawer is discharged, unless the holder can show that he has not been guilty of unreasonable delay; and what is unreasonable delay is a question to be decided on the facts of each case (*Walker Bank. Laws*, 63, and cases there cited).

The giving and taking of a negotiable check on a bank or banker for and on account of a debt is, however, on technical grounds deemed equivalent to payment until it has been presented for payment and refused (*Id.* 91; *Monroe Bank. Dec.* § 132), for by accepting the check the holder takes upon himself the performance of this duty, and the risk of doing it diligently is upon him. These are some of the principal rules regulating the drawing and presentation of bank checks, to which there are several exceptions; one of which is that where the drawer of a check stops payment of it, he knows it cannot be paid, and cannot therefore object to the want of notice of non-payment (*Purchase v. Mattison*, 6 *Duer*, 587; *Jacks v. Darrin*, 3 *E. D. Smith*, 557). Until payment or acceptance, checks, which are mere orders to pay, may be revoked by the drawer (*Lunt v. Bank of North America*, 49 *Barb.* 221; *Van Allen v. American National Bank*, 3 *Lans.* 517; *Freund v. Importers' and Traders'*, 3 *Hun*, 689).

This rule was practically applied in *Schneider v. Irving Bank* (30 *How. Pr.* 190), where the court held that "where a bank receives notice from a depositor not to pay his outstanding check, as he has a defense to it, and the teller of the bank promises not to pay it, but subsequently when the check is presented it is paid by the bank, the bank is liable to the depositor for the amount. A check is but an order on the bank, which it has not accepted, and upon which it is not liable. It is, therefore, competent for the drawer to revoke the authority which he has given to the bank to apply their funds to the payment of it."

The stoppage of payment, therefore, prevented the bank (the defendant's agent) from paying the checks to

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anyone, for the authority to pay was legally countermanded (1 *Wait Act. & Def.* 643). Presentation and notice after that would have been idle ceremony, which the law, in adapting itself in a practical way to business usages, does not require.

The stoppage made the payment by the bank an impossibility and left the holder of the checks without any remedy, except that which the law gave against the defendants as the principal debtors, and if there is no remedy against them, there is a consequent failure of justice. The stoppage of the checks operated as an election by the defendants to treat the entire fund on deposit as their own, and as a denial and exclusion of the holders of the checks in question to any participation in it. The bank did not fail until several weeks after this time, and the defendants were free from the time of the stoppage to draw from the bank the entire amount to their credit, unembarrassed in any way by the existence or loss of the checks, the payment of which had been rendered impossible. If they had previously made any appropriation of money to these checks by clerical entries on their check-books, the stoppage was tantamount to a recredit of the amount, which they had the right to make, according to business usages, on their own books at least, but this circumstance is of little significance in a legal sense.

The subsequent failure of the bank in no way affected the position which the defendants had taken, and the want of presentation in time did not change their situation or status, nor do them any injury. The fact that their trusted agent, the bank, afterward failed, is a misfortune which they must bear. They cannot compel the plaintiff to share it with them. The relation of debtor and creditor which existed between the defendants and their agent (the bank) enabled them to collect from it forty per cent. of their entire deposits. There was no legal mode in which the plaintiff could prevent the payment; it was not owner of any part of the fund, legally

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or equitably; the bank owed it no duty, and it had no rights against the fund which the law would recognize. The fact that the payee requested the defendants to stop payment, in no way alters the legal effect of their act. The stoppage of payment revoked or canceled the checks as existing obligations for every purpose, except that of action on them, the checks being for that purpose evidences of debt only.

The lost checks have never been found, and will probably never come to light; and if found, could not be used unless reissued by the defendants, for that would give them the force of new checks. They require indorsement to make them negotiable in the hands of any person other than the plaintiff. If this circumstance does not make the tender of a bond of indemnity unnecessary (*Cow. Tr.* § 401), its tender at the trial was sufficient (3 *R. S.* 6 ed. 672, old § 76; Code, § 1917; *Cow. Tr.* § 400; *Smith v. Rockwell*, 2 *Hill*, 482; *Frank v. Wessels*, 64 *N. Y.* 155).

Upon the entire case, it follows that the plaintiff is entitled to judgment upon the special verdict for \$252, which includes the proper allowance of interest.

City Court.

Special Term—May, 1886.

POND ET AL. *against* McKAY ET AL.

The defendant testified on supplementary proceedings that he executed a bill of sale to a person named Tyng; that he was introduced to him by his attorney, and knew nothing of him. The attorney was called as a witness and asked to state who Tyng was. He declined, on the ground of privilege. *Held*, that the inquiry did not involve a confidential communication and was not privileged.

McADAM, Ch. J.—The defendant Key testified that the defendants executed a bill of sale of the Dazlan claim

Seltz v. Berg.

to a gentleman named Tyng, to whom they were introduced in their attorney's office; that they did not know Tyng's first name, nor his business or place of residence. Their attorney was then sworn, and asked whether he knew the man Tyng referred to by his client. The attorney refused to answer, on the ground that the knowledge he obtained was privileged as a confidential communication, and the referee has certified the refusal to the court. The objection is clearly captious and trifling (70 *N. Y.* 55; 1 *Hill*, 33; 12 *Abb. Pr.* 249; 25 *Alb. Law J.* 24; 32 *Moak's Eng. R.* 164 n.).

The attorney was not asked to reveal any secret imparted to him by his clients, but to give information of a fact in respect to which his clients are and always have been ignorant and cannot supply, and of which fact the attorney alone has knowledge. The proposed revelation breaks no confidence which the law refuses to unseal. The cases cited by the attorney (4 *Wend.* 555; 17 *Johns.* 335; 14 *Id.* 391; 9 *How. Pr.* 419) have no application whatever to the question involved.

The refusal to answer was contumacious, and the attorney is adjudged guilty of contempt, and will be fined \$6 referee's fees and \$10 costs of motion, and will be imprisoned until the question is answered and the costs are paid.

City Court.

Special Term—May, 1886.

SEITZ *against* BERG.

A recovery of less than \$50 in an action for breach of promise to marry, entitles the defendant to costs.

McADAM, Ch. J.—The action is for "breach of a promise to marry," and seduction is pleaded in aggravation of damages only (8 *Barb.* 323; 30 *N. Y.* 285). The

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only civil action which can be founded on "seduction" is by the parent or other person entitled to the female's services to recover for their loss (26 *Barb.* 615; 11 *N. Y.* 343). The present action is not so brought, and is not for seduction in the sense in which that term is used in subdivision 3 of section 3228, of the Code in regard to costs. The recovery herein for the breach of promise being less than \$50, it follows that that the defendant is entitled to a full bill of costs (Code, § 3228, § 3229, subd. 4).

Re-taxation ordered in accordance herewith.

City Court.

Special Term—May, 1886.

MARTIN RUST *against* E. M. STUART, BETTER
KNOWN BY THE STAGE NAME OF BILLIE BARLOW.

An actress who goes to Europe to fill a three months' engagement is not leaving the State to defraud creditors.

McADAM, Ch. J.—The defendant, an actress, has gone to Europe with the Dixey troupe to fill a three months' engagement under a contract which provides for her return on its conclusion. The plaintiff, a grocer, has attached her property on the ground of its contemplated removal to defraud creditors.

Actors connected with a company are expected to follow it on the road, and to Europe, if necessary, without the imputation of fraud on their creditors; for the company's trip to Europe has evidently no relation whatever to the defendant's creditors, and has in view only the financial success of the management at whose risk the venture is made. Every business man ought to understand these plain rules which at times keep theatrical people on the wing, and if tradesmen sell them on terms other than cash

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on delivery, they must trust them with reference to the established usages of their profession. It may be hard on the plaintiff to be delayed in the collection of his debt, but this is one of the consequences of the credit system, and the hardship is not a legal ground for attachment, which can issue only where fraud on the part of the debtor is the object of his departure and the fraudulent intent is clearly established.

City Court.

Special Term—May, 1886.

BEEMER *against* McCOY.

An action will not be stayed because the costs of a former action were not paid, unless the causes of action are identical.

McADAM, Ch. J.—Where it is sought to stay the prosecution of an action because the costs of a former action have not been paid, it must appear from the record that the actions are identical (10 *Weekly Dig.* 199; 10 *Reporter*, 152; 9 *Daly*, 259). The plaintiff swears that he holds two notes of the defendant of the same date and amount, and that the \$500 note included in the former action is not the one sued upon here.

The motion for a stay will, therefore, be denied. No costs.

In *Dare v. Murphy* (New York Supreme Ct., *Daily Register*, March 1, 1887), Judge ANDREWS said :

There is no absolute right in a defendant to demand the judgment of the court forbidding the prosecution of a second suit until the costs of a former action are paid. It is an equity depending generally upon the circumstances of each particular case and addressed very much to the sound discretion of the judge to whom the application is made

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(*McMahon v. Life Ins. Co.*, 12 *Abb. Pr.* 30). The cases in which orders have been made staying proceedings in an action until the costs of a former action have been paid, have usually been those in which the former action was disposed of by a trial upon the merits. The plaintiff in the present action swears that the former action brought by him in the marine court was dismissed for want of prosecution through the neglect of his attorney and without his knowledge. Moreover, while the cause of action now set up in the complaint includes the cause of action set up in the complaint in the marine court, there may be some question whether the issues can be regarded as identical within the decisions in the cases where proceedings have been stayed in an action until the costs of a former action have been paid.

The plaintiff and his attorney insist that the present action is brought in good faith, and, upon the whole, I think it a proper exercise of discretion to deny the motion, with \$10 costs to abide the event.

In what Cases Ordered.

An action by an assignee may be stayed until the costs of a former action by the assignor for the same cause are paid (*Barton v. Spels*, 78 *N. Y.* 133; and see cases cited in the briefs of counsel). Where an order is made bringing in a new party defendant in an action, the court making the order has not the power to restrain in it the prosecution of an action theretofore brought by such new defendant against one of his co-defendants. If such restraint is proper for any cause, a stay must be procured by the aggrieved party in the action itself (*Wood v. Swift*, 81 *N. Y.* 31).

Suit in Foreign Jurisdiction

is no bar to a suit here for the same cause (see 1 *City Ct. R.* 455).

Laches may Defeat the Motion.

The common pleas, in *Noe v. Gregory* (8 *Weekly Dig.* 21) intimate that the motion should be made before issue joined (See also *Verplanck v. Kendall*, 11 *Weekly Dig.* 346; 47 *N. Y. Superior Ct.* 513). Prior to joining issue, the application seems to be almost as of right, afterwards it probably becomes discretionary (see *Robertson v. Barnam*, 29 *Hun*, 657). Laches may defeat a motion for security for costs even when it would have been granted as of right, if the application had been promptly made (*Swan v. Matthews*, 3 *Duer*, 618; *Lewis v. Farrell*, 46 *Super. Ct.* 358; *Buckley v. Gutta Percha Co.*, 3 *Civ. Pro.* 429; *aff'd*, 98 *N. Y.* 637; *McDonald v. Peet*, 7 *Civ. Pro.* 200), and there is no apparent reason for distinguishing between the two classes of applications.

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City Court.

Special Term—May, 1886.

VREDENBERGH ET AL against BEUMONT.

Wherean order to examine a debtor is founded on the fact that he resides in this county, and the debtor moves to vacate it on the ground that he resides in another State,—*Held*, that as in either case the plaintiff was entitled to the order, the motion must be denied.

McADAM, Ch. J.—Plaintiff's affidavit in supplementary proceedings charges that the defendant resides in New York, and does business in that county. The defendant moves to vacate the order, on the ground that he does not reside or do business in New York, but resides in Pennsylvania. In either case, the order for examination is proper (*Code*, § 2458), and as the affidavits on either side establish the right to the order, though on different grounds, it cannot be vacated.

The examination, must, therefore, proceed.

City Court.

Special Term—May, 1886.

FRAZIER against TOWN, AS TRUSTEE.

When judgments against trustees become liens on the real estate of the *cestui que trust*, considered.

McADAM, Ch. J.—The judgment herein was entered May 3, 1886, against Charles H. Town, trustee, &c., on

Frazier v. Town.

an obligation made by him in 1882, while he was trustee of certain real estate under a marriage settlement in which Anna S. Stagg (afterward Foster) was the beneficiary. In June, 1883, Town resigned, and Theodore M. Roche was appointed trustee in his place. Roche now moves for leave to come in and be made a party, that he may defend the action, founding his right upon the erroneous assumption that the judgment is a lien upon, and enforceable against, the trust estate. If the trust property is to be made liable for a debt created by the trustee, it must be by a special proceeding or decree, and not by an ordinary judgment entered against the trustee, even though described as such in the record.

There is no more authority now to sell the trust estate in an ordinary action for money brought against the trustee than there was before the adoption of the Code (*Mallory v. Clark*, 20 *How. Pr.* 418; and see *Hunt v. Townsend*, 31 *Md.* 336; 4 *J. J. Marsh.* 599; 2 *Black*, 208; 6 *Barr*, 296). Beside, Town did not hold any title whatever to the trust estate when the judgment was recovered, and has no trust property in his hands on which an execution can be levied (*Code*, § 1371). He seems to be content with the judgment, for he swears that there is no defense to the claim on which it was recovered, and that it ought to be paid. If he will not litigate I see no reason why the new trustee, and the *cestui que trust*, who cannot be affected by the judgment as it stands now, should be brought in and allowed to litigate on his behalf. When the plaintiff seeks by appropriate proceedings to enforce the judgment as an equitable charge against the trust property, the *cestui que trust* and the new trustee will have their day in court, and will be entitled to be heard in opposition, and may present any defense they may have. In the meantime they need no relief or protection.

The application will be denied, without costs, and to save any possible question, the denial will be with

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leave to renew on proving that the relief applied for is necessary to protect the estate from the operation or effect of the judgment (*Code*, § 452).

City Court.

Special Term—May, 1886.

POND, Ex'r, &c., *against* SOLOMON.

A witness subpoenaed by *duces tecum* may be relieved by the court from producing unnecessary books.

McADAM, Ch. J.—While a witness as well as a party in supplementary proceedings may be required to produce books and papers by a subpoena *duces tecum*, or by an order (*Code*, § 867 ; 6 *Civ. Pro. R.* 360), the court or referee may relieve him wholly or partly from the obligation imposed (*Code*, § 867; 11 *Week. Dig.* 398). The subpoena served herein is broad and not specific in its command, nor is it certain that any of the books sought will aid the judgment creditor. The witness may, therefore, proceed with his examination, and if it appears thereat that any particular book or books are necessary for the legitimate purposes of the examination, the subpoena will be limited thereto and satisfied by their production; and if none are required, the witness will be wholly relieved from their production. Banks and merchants (particularly if strangers to the litigation), should not be required to bring to court all their books at the instance of any judgment creditor who is willing to pay fifty cents (6 *Abb. N. C.* 437) for the liberty of inspecting them. The court or referee, and not the creditor, is to be the judge of the propriety of exercising this extraordinary and

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economical power of inspection, which, in order to prevent abuse, must be limited to the exigencies of each particular case.

City Court.

*Special Term—May, 1886.*JULIO ET AL. *against* EQUITABLE LIFE ASSUR-
ANCE SOCIETY.

A supplemental answer pleading a general release should be allowed only on payment of all costs to date of the application.

McADAM, Ch. J.—The court may, and in a proper case, *must*, “upon such terms as are just,” permit a supplemental answer, alleging material facts which occurred after the former pleading (*Code*, § 544). The proposed supplemental answer herein pleads the release of the alleged cause of action, and is therefore material, and the court must therefore permit it to be interposed, and the only question is “what terms are just” under the circumstances. As the defense proposed is one which is likely to defeat the action and deprive the plaintiff’s attorney of the taxable costs which he has earned and might otherwise have collected, the application will be granted on payment of all the costs and disbursements to date,—to wit: \$43.25,—with leave to the plaintiff’s attorney, on receiving such payment, to discontinue the action without costs. In *Troy & Boston R. R. Co. v. Tibbitts* (11 *How. Pr.* 168), the court permitted the plaintiff to change the ground of action “on payment of all the costs of the defense to date.” In *Sage v. Mosher* (17 *How. Pr.* 373) the court, said “a plaintiff should not be permitted to

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[serve a supplemental bill] at the expense of the defendants" (and see 11 *Reporter*, 60).

Where the new defense is calculated to defeat the entire action, it seems to be but equitable, that the defendant should, as a condition to its interposition, pay the plaintiff's costs to date (40 *Hum*, 216) and give him permission to withdraw from a prosecution which by the new defense becomes futile.

Settle order in accordance herewith.

City Court.

Special Term—October, 1886.

ROBERTS *against* ADEN.

The defendant after issue joined noticed the cause for trial, but the plaintiff failed to put it on the calendar. *Held*, that the defendant was entitled to \$15 for proceedings after notice of trial.

McADAM, Ch. J.—The Code allows to either party "for all proceedings, after notice of trial and before trial, \$15" (*Code*, § 3251). The defendant noticed the cause for trial, but the plaintiff did not. The cause never appeared upon the calendar, and was finally dismissed for want of prosecution. The clerk has refused to tax this \$15. This was error. The defendant did all the statute required him to do to entitle him to the \$15. He noticed the cause for trial, and presumably searched the calendar, and watched the subsequent progress of the case. The plaintiff was the aggressive party and should have pressed his suit. His failure to put the case on the calendar and bring it to trial should not militate against the defendant, who, while on the defensive, took the necessary steps to preserve his rights.

The item of \$15 will be allowed.

Randell v. De Abrisquesta.

City Court.*Special Term—October, 1886.***WILSON against TRAENDLEY.**

In an action against a commission merchant to recover the proceeds of sales of consigned goods, the plaintiff ought to give the items of the goods consigned and the defendant his account of sales.

McADAM, Ch. J.—The action is against the defendant to recover the proceeds of goods consigned to be sold on commission. In this, as in other cases of the kind, the plaintiff (as nearly as he can) ought to give the items of the goods consigned, and the defendant (as nearly as he can) ought to furnish his account of the sales made.

To this extent, the application for a bill of particulars will be granted (see *Miller v. Kent*, 60 *How. Pr.* 388; 93 *N. Y.* 467). No costs.

City Court.*Special Term—October, 1886.***RANDELL against DE ABRISQUESTA.**

The non-payment of motion costs only stays an aggressive but not a defensive act by the party owing them.

McADAM, Ch. J.—The defendant served his answer in time, but it was returned by the plaintiff, on the ground that, because the defendant owed \$10 motion costs, his proceedings were stayed, and that he could not make his

Lobenthal v. Keller.

defense until the costs were first paid (*Code*, § 779; 3 *Abb. N. C.* 50; 4 *Id.* 13; 54 *How. Pr.* 23).

This is a mistaken notion of the rule. The provision of the Code (§ 779) "was intended to prevent an onward movement in an action by a party who owed costs of a motion" (26 *Hun*, 520), but was not intended to prevent a party moved against from asserting his natural and legal right of self-defense. In *Lyons v. Murat* (54 *How. Pr.* 23), the plaintiff, who owed motion costs to the defendant, was held stayed, until payment, from serving a reply to a counter-claim pleaded by the defendant. But the plaintiff was the aggressor in that case. He was the moving party, and his action was in the nature of an onward movement against the defendant, and the court stayed his further prosecution of the action until costs due had first been paid. That case extends the rule as far as it can be carried. It does not reach the question in the form in which it is now presented.

It follows that the motion for judgment as by default for want of an answer must be denied.

City Court.

Trial Term—March, 1886.

LOBENTHAL *against* KELLER.

Neither an action nor a counter-claim can be maintained at law by one partner against another growing out of an unsettled partnership relation. The remedy is in equity.

McADAM, Ch. J.—The defendant's claim for contribution is valid to the extent of \$150 and interest, making together \$168; but it is not the proper subject of counter-claim, because it grows out of an unsettled partnership

West v. Crosby.

relation existing between him and the plaintiff's assignor. The defendant has a suit now pending for an accounting, in which he may appropriately charge the above \$168 against his partner in the adjustment of the accounts. The following authorities sustain these conclusions: *Waterman on Set-off*, 178, 179; *Barbour on Set-off*, 90; *Story on Part.* §§ 221-223; 3 *Hill*, 188; 27 *Barb.* 554; *Story Eq.* §§ 664, 665; 14 *Johns.* 318; 1 *Hall*, 180; 6 *Barb.* 537; 23 *Id.* 184; 4 *N. Y.* 186; 43 *Id.* 598; 54 *Barb.* 223; 1 *Duer*, 667. A counter-claim, even if used merely as a set-off, is in the nature of a cross action, which cannot be maintained at law, by one partner against another, until there has been a settlement had and balance struck. The theory of the equity suit is that because the partners have not agreed upon a balance the court should, after the accounting, declare one.

The plaintiff, is, therefore, entitled to judgment for \$384.04 with costs.

City Court.

General Term—March, 1886.

JOHN W. WEST *against* HIRAM B. CROSBY ET AL.

Administrator's bond. Liability of sureties. Jurisdiction. The sureties of an administrator are liable for costs awarded against their principal, in a proceeding in the surrogate's court "touching the administration of the estate." The decree or order to pay is all that is necessary to warrant the action against the sureties. The city court has jurisdiction of such an action.

Appeal from judgment entered on order overruling demurrer.

McADAM, Ch. J.—The city court has jurisdiction of any common-law action wherein the amount finally recovered does not exceed \$2,000 (*Code*, §§ 315, 316). The present action is comprehended by these broad provisions.

The bond signed by the defendants is conditioned that "if Sarah L. Fuller shall faithfully execute the trust reposed in her as administratrix of all and singular the goods, chattels and credits of Jim Billings Fuller, late of the city of New York, deceased, and shall obey all orders of the surrogate of the county of New York, touching the administration of the estate committed to her, then the obligation is to be void, otherwise to remain in full force."

After the execution of this bond,—to wit, on April 22, 1879,—letters of administration were issued to the said Sarah L. Fuller, by the surrogate of New York county.

On September 28, 1885, in a proceeding for that purpose had in the surrogate's court, a decree was duly made and entered by the surrogate, revoking the said letters of administration and ordering the administratrix to render an account of her proceedings and to pay and deliver over to her successor in office, all money and other property in her hands, and directing her to pay to Sarah H. Burgess the sum of \$280.50, as the costs and disbursements of the said proceeding.

The decree was duly docketed, and a copy duly served upon Sarah L. Fuller, who disobeyed the surrogate's order by refusing to pay said costs and disbursements. Execution was duly issued and returned unsatisfied. The decree was assigned to the plaintiff, and the surrogate made an order permitting him to prosecute the said bond according to the statute in such case made and provided.

The defendant demurred to this complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The court at special term overruled the demurrer; and from the judgment entered on this order the present appeal is taken.

The defendant's, counsel relies entirely upon technical objections to sustain his demurrer. He claims that the sureties cannot be held for the costs awarded; but we think they can. The order disobeyed by the administratrix was for the payment of \$280.50, costs and disbursements of "said proceeding." It was made "touching the administration of the estate," and was within the terms of the bond. The decree was against the principal in a proceeding relating to the estate. It embodied several orders "touching the administration," and the surrogate, as an incident of the administration, ordered the payment of a fixed sum as costs.

The authorities cited by the respondent in his points sufficiently show his right to maintain the action.

The theory presented by the defendants that an accounting must be had and the administrator's ability to pay established, before suit brought, cannot be sustained (see *Taylor v. Clark*, 48 *Barb.* 243; *affd.*, 41 *N. Y.* 620; *S. C.*, 4 *Abb. Ct. App. Dec.* 391). There was certainly no need of an accounting here, because the principal on the bond was ordered to pay these costs, irrespective of the condition of the estate. Costs are incident to all legal proceedings, as well as to the administration of intestate's estates, and are as fully comprehended by the official bond of an administrator as any other contingent liability growing out of the administration can be. The defendants argue that the official bond is only to protect existing creditors of the estate. This is so to an extent; but it embraces costs which those creditors may subsequently incur and recover, and the payment of which may be enforced as well as the debt (*Laws* 1837, chap. 469, § 63; *Code*, § 2607).

It is said that these costs were awarded against the principal personally. This may be so; but they were awarded "in proceedings touching the administration of the estate," and were incidental thereto. The order to pay was one of the lawful orders of the surrogate which

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- the sureties agreed that their principal would obey. The principal did not pay, and there is no just reason why her sureties should not (*Code*, §§ 2607, 2609). There are no merits in the appeal, and unless there is some hidden technicality which prevents the application of plain legal principles to this case, the judgment appealed from must be affirmed, with costs.

HYATT and BROWNE, JJ., concur.

City Court.

Special Term—April, 1886.

HEIMERS *against* DAVIDSON, SHERIFF.

Where a public officer succeeds at a trial in obtaining final judgment in his favor, he is entitled to double costs. He is not entitled, however, to a double bill on the mere reversal of a judgment recovered against him.

McADAM, Ch. J.—Where a public officer succeeds at the trial in obtaining “a final judgment in his favor,” he is entitled to double costs (*Code*, § 3258). If the judgment so obtained by him is affirmed on appeal, he is entitled to double costs on the appeal (*Burkle v. Luce*, 1 *N. Y.* 293; *S. C.*, 3 *How. Pr.* 236). But if the public officer does not obtain a final judgment in his favor, he cannot obtain double costs upon a mere reversal of the judgment, which is not a final adjudication. He must, according to the statute as interpreted by the courts, succeed on the trial or obtain a final judgment in his favor before the right to double costs attaches (3 *Law Bull.* 29; 18 *How. Pr.* 468; 4 *Hill*, 546; 6 *How. Pr.* 253; 9 *Id.* 80);

Conway v. Kennedy.

but when it once attaches by force of the statute, it applies to any appeal at which he succeeds in sustaining the judgment originally rendered in his favor.

Taxation affirmed.

City Court.

Trial Term—March, 1886.

DELIA C. CONWAY *against* FRANK J. KENNEDY.

Where a marshal under a warrant in summary proceedings puts goods out of the premises upon the public sidewalk, the landlord is not responsible for what becomes of them. If, however, the landlord takes the goods into his cellar, he becomes a gratuitous bailee and cannot legally refuse to give up the goods until the back rents and costs are paid. Such a refusal constitutes a conversion.

It appeared that Mrs. Conway, a widow, occupied a tenement at No. 248 Elizabeth street, and that she disappeared early in April, 1885, leaving the April rent unpaid.

The landlord commenced summary proceedings, obtained judgment, and the marshal under warrant put the landlord in possession. Instead of putting the tenant's goods on the sidewalk they were put in the cellar. Mrs. Conway came back to the premises in May, having, as it appeared, been in Charity Hospital since her disappearance in April. She demanded her property, and the landlord refused to give it up unless she paid \$10, the rent due. He finally consented to take \$5, but Mrs. Conway refused to pay anything. She thereupon sued Kennedy for \$150 as the value of the property detained, on the theory of conversion.

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Chief Justice McADAM charged the jury that if the marshal had put the plaintiff's property upon the sidewalk there would have been no cause of action against the landlord, no matter what became of the goods afterward, because they were removed by act of the law. But the landlord did not do this. He kindly took the property into his cellar, and thereby became what the law terms a gratuitous bailee. The plaintiff was not obliged to pay the landlord anything for taking care of her goods, for she never requested him to take care of them. The law gives the landlord no lien on his tenant's goods for rent or such like charges, so that the landlord, by refusing to give up the goods unless certain illegal conditions which he imposed were complied with, committed an act which amounted in law to a conversion of the property, and made the landlord liable for its value.

The jury awarded the plaintiff \$85.

City Court.

Trial Term—March, 1886.

BARBARA ZENNER *against* JOHN NEWMAN.

To make the owner of a dwelling out of possession liable to the occupant for an overflow or leakage from water-pipes, it is necessary to prove that the owner interfered in some way with the management of the premises by making repairs and doing them negligently, or the like. An owner is not liable for injuries caused by defective pipes unless there be some defects in their construction.

McADAM, Ch. J., in granting a motion to dismiss the complaint, said:—The action is not brought against an occupant in actual possession of the upper part of the

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house, where the overflow occurred. If it had, it might perhaps be inferred that the overflow was caused by some act of the occupant of such upper floor. The action is not even brought against the plaintiff's landlord, between whom and the plaintiff there is a privity of contract and a reciprocity of obligation, but is brought against the owner of the realty, out of possession. To charge the owner out of possession it is necessary to prove that the owner interfered in some way with the management of the premises by undertaking to make repairs, and doing them so negligently that damage resulted in consequence. The injuries for which damages are claimed were received in December, 1884, and the repairs were made in July previous. If the overflow had occurred while the pipes were undergoing repairs, it might be fair to infer that the overflow was caused by the plumber, the owner's agent; but for an overflow occurring months afterwards, the owner is not liable, certainly not without affirmative proof that the work was defectively done, and that the damage resulted from this cause.

The owner of the realty is not liable for overflow caused without his fault, nor is he liable for injuries caused by defective pipes, unless there was some defect in their original construction. He is not liable for the consequences of age, or for wear and tear. No fault or defect in original construction is charged in the complaint, but the complaint alleges that, by reason of the negligent and improper manner in which the pipes were repaired and left by the defendant, an overflow occurred on December 6, 1884, by which the household goods, carpets and furniture of the plaintiff were wet, soiled and damaged, to the amount of \$600. So that, as I have remarked repeatedly during the trial, the theory of the case on which the owner is to be held liable is, that he made these repairs so defectively that an overflow occurred as a natural result. There is no affirmative proof that the repairs were defectively made. The tenant, as a rule,

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takes premises very much as he takes a wife—for better or worse. The plaintiff, as before remarked, had no contract with the defendant, and he is not liable to her for defects in the plumbing or for overflows caused in consequence. If, for example, I bring suit against you, the first question is, is there any privity of contract? did you agree to do anything that you have not done? If not, then you are not liable on the theory of contract, because you made none.

That is the position of the present owner of the realty. He made no contract with the plaintiff; therefore, there is no contract obligation. How is he liable, then? Did he do anything wrong? There is no pretense that he ever misrepresented the condition of the premises to the plaintiff, for he never let them to her. He did not say anything to her, and made no contract with her. He is liable to her only on the theory of a tort or a wrong. If you knock a man down there is no contract to pay the damages, but the law will make you respond nevertheless. The owner of the realty out of possession is liable only upon the theory of misconduct. Making repairs in a defective or improper manner, whereby damage is caused, is a wrongful act, but the difficulty is, there is no proof that they were defectively or improperly made, or that the owner committed any wrong.

He had a right to assume that the plumber he sent to do the work would do it properly. That is the legal presumption. If you employ a competent man to do work, the presumption is that he will do it properly. If he does not do it properly, the onus of proving that, is on him that alleges it; therefore, the onus in this case was on the plaintiff.

The fact that, five months after repairs were made, an overflow occurred, does not in itself prove defective workmanship or misconduct on the part of the defendant. A plumber is not an insurer. He does not insure how long his work will last, unless he gives a guarantee; nor is a

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property owner an insurer against accidents or overflows caused by the work of a plumber; nor is the owner bound to put in pipes unless he agrees to do it. I cannot say to my landlord, "These pipes are old, and I want you to put new pipes in the house." He might legally say, "I never agreed to do that. If you had asked me to put in new plumbing when you hired the house, I might have charged you more rent." The tenant may say, "Well, it wet my carpets." The landlord might well answer, "That is not my fault; you should have guarded against that."

I know of no legal principle on which a recovery against the defendant can be maintained.

A number of plaintiff's witnesses have testified what the landlord should have done to prevent the injury which resulted. The difficulty is, he did not agree to follow their advice or directions, or to obey their orders. It might have been wise policy to have done so, but he did not agree to do so; therefore, he cannot be obliged to do it. If the plaintiff has any remedy, it is against the person from whom she hired, and that depends, in a very large degree, upon the nature of the contract between them. That is not in evidence here, because the action is not between those parties; but it is clear to me, on legal principles, that the property owner is not liable, in the absence of positive proof that his agent did some wrong that resulted in loss to the plaintiff.

For these reasons, the complaint will have to be dismissed.

Sherman v. Herbert.

City Court.

*Trial Term—March, 1886.*THADDEUS SHERMAN *against* GEORGE W.
HERBERT.

A book-keeper is not a laborer within the meaning of the general manufacturing act, and the fact that he was to be paid by the week does not change the result. The nature of the service to be rendered, and not the mode of payment, determines whether the employee is a laborer or not within the statute.

Trial by the court without a jury.

McADAM, Ch. J.—The defendant, as a stockholder of a corporation created under the general manufacturing act (*Laws* 1848, chap. 40) is sought to be personally charged with a debt of the company, on the ground that the plaintiff, who performed services as a book-keeper, is a “laborer” within the meaning of section 53 [18] of the act, which makes stockholders personally liable for such debts. But a bookkeeper is not a laborer with the meaning of the act (*Wakefield v. Fargo*, 90 *N. Y.* 213). It is contended, however, that the case cited applies only to one whose compensation is determined by a yearly salary, whereas the plaintiff was to be paid by the week. The attempted distinction is without merit. The character of the employment, and not the rate of compensation or mode of payment, determines whether an employee is a laborer or not within the meaning of the act in question. The proposition seems too clear for discussion, but if any

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argument is required to support the view declared, it will be found in the case cited.

Upon this ground, the complaint will be dismissed, with costs.

City Court.

Trial Term—February, 1886.

HENRY C. CAMPBELL *against* CHARLES M.
VANDERVOORT ET AL.

When a person demands money of another as a matter of right, and he pays it with full knowledge of the facts on which the demand is founded, or with the means of information at hand, and without fraud or deceit, he can never recover back the sum he has so voluntarily paid.

Motion for new trial on judge's minutes.

J. Homer Hildreth, for plaintiff.

J. H. McCarthy, for defendant.

McADAM, Ch. J.—The defendants let to the plaintiff certain premises, known as Nos. 546, 548, 550, 554 and 556 East 117th street, together with a steam driving power for his machinery equal to thirty horse-power, for the term of two years and forty-five days from February 14, 1885, at the yearly rent of \$2,700, payable monthly in advance. Under this lease, the plaintiff paid his rent until June 14, 1885, under the belief that he was receiving thirty horse-power, when, as a matter of fact, he received not more than ten horse-power.

The action is to recover the amount paid for the

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twenty horse-power not received. The question is whether, on the proofs presented, the action can be maintained.

The plaintiff places his right of recovery upon two grounds: First. That the amount paid for the twenty horse-power not received was so much money paid by mistake. Second. That the amount paid was obtained by fraud and deceit. These grounds will be considered in order. The books are full of cases where recoveries have been sustained for money paid by mistake of fact—some going to the extent of holding that money paid in advance on account of services to be performed, may be recovered back in case of non-performance in an action for money had and received (*Wheeler v. Board*, 12 *Johns.* 363). But I have not been able to find any authorities extending the rule to cases where the contract has been substantially performed, and there has been only a partial failure of consideration, and the money sought to be recovered back was paid after the failure complained of. Thus, in *Clarke v. Dutcher* (9 *Cow.* 674), where the tenant paid his landlord at the rate of £4 14s. currency for £2 10s. sterling, the rent being reserved in sterling money; it was held that he could not recover back the excess. The court, in concluding its opinion, said:

“The rent was demanded by the landlord as his right. By submitting to the demand, he gives the money to the party to whom he pays it and closes the transaction forever.”

Justice GIBBS, in *Brisbane v. Dacres* (5 *Taunt.* 144), cited in 9 *Cow. supra*, said: “Where a man demands money of another as a matter of right, and he pays it with a full knowledge of the facts upon which the demand is founded, he never can recover back the sum paid. By submitting to the demand, he that pays the money gives it to the person to whom he pays it, and closes the transaction between them. He who receives it has a right to consider it as his without dispute; and it would be

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most mischievous and unjust, if he who has acquiesced in the right by such voluntary payment should be at liberty at any time within the statute of limitations to rip up the matter and recover back the money."

The case last cited uses the words "with knowledge of the facts," but the means of knowledge of the facts upon which the demand is founded in law, produce the same legal effect, and in neither case can the money be recovered back (*Clarke v. Dutcher, supra*; *Monatt v. Wright*, 1 *Wend.* 355; *Supervisors v. Briggs*, 2 *Den.* 26; *Wyman v. Farnsworth*, 3 *Barb.* 369). The lease in the present case called for \$2,700 per year, payable monthly, so that when the plaintiff paid the rent from February till June, 1885, he paid just what the lease required him to pay, and the defendants received just what the lease entitled them to receive. The defendants demanded and received the money as their own, not in advance, but as after performance, and in the language of the cases before cited (9 *Cow.* and 5 *Taunt. supra*), the payment closed the transaction between them as far as it went. The action for money had and received is not maintainable; if, as in this case, the contract has been in part performed, and the plaintiff has derived some benefit, so that were he to recover a verdict, the parties could not be placed in the same situation in which they respectively stood when the contract was entered into (2 *Chitty on Contracts*, 11 *Am. ed.* 923, and cases cited). *Hawkins v. Mosher*, 2 *Weekly Dig.* 152, was held to be an exception to the general rule stated, and the judgment was reversed, on the ground that the plaintiff was entitled to recover at least nominal damages for the breach proved. In the present case, nominal damages were allowed, so that the error found in that case does not exist here.

Second. There is no evidence proving the fraud alleged. The plaintiff's theory is that he paid for what he supposed he was getting, and the defendants, no doubt, received pay for what they, in like manner, supposed they

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were giving. There is no proof that the defendants knowingly cheated the plaintiff, and there is no reason or ground for such a charge, so that all the essential elements of fraud are wanting, and the question of fraud as a ground of recovery need not be seriously discussed. Nor is there ground for charging constructive fraud. If the defendants failed to perform their covenants, the plaintiff had an action for the breach, in which he might have recovered his actual loss (*Crane v. Hardman*, 4 *E. D. Smith*, 339).

The plaintiff might have obtained the necessary steam-power elsewhere, or supplied it himself and recovered the expense caused in consequence; but he did neither. He took the power transmitted to him, made no complaint, paid his rent, and then brought this action to recover back what he regards as the proper amount to be refunded; but there is no evidence to warrant the deduction claimed. There is no proof that the actual loss amounts to anything beyond nominal damages. The fact that the plaintiff was to pay \$50 for each extra horse-power furnished beyond the thirty horse-power, in case it was required, does not furnish a legal measure of damages in respect to the power not furnished, as the extra horse-power called for might have caused extra expense to the defendants, and perhaps extra engines. Viewing the case in all its aspects, I think, in view of the evidence and the absence of proof of actual damage, that the direction to find in favor of the plaintiffs for nominal damages was right.

It follows that the motion for a new trial must be denied.

Affirmed on appeal.

It is well settled as a general rule of law, that money voluntarily paid on a claim of right, where there has been no mistake of fact, cannot be recovered back on the ground that the party supposed he was bound in law to pay it when in truth he was not (*Clarke v. Dutcher*, 9

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Cov. 674). He shall not be permitted to allege his ignorance of the law, and it shall be considered a voluntary payment (*Id.*). In *Brisbane v. Dacres*, 5 *Taunt.* 144, Mr. Justice GIBBS said, where a man demands money of another as a matter of right, and he pays it with a full knowledge of the facts on which the demand is founded, he can never recover back the sum he has so voluntarily paid. The same principle is ruled in *Mowall v. Wright*, 1 *Wend.* 855; *Lyon v. Richmond*, 2 *Johns. Ch.* 51. Mr. Chief Justice WATTE, in pronouncing the judgment of the court in *Railroad Co. v. Commissioners*, 8 *Otto*, 541, which was a suit to recover back taxes which the company had paid, declared it to be a rule of the common law that "where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without immediate and urgent necessity therefor, or unless to release his person or property from detention or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered. And the fact that the party at the time of making the payment files a written protest does not make the payment involuntary." He evidently referred to personal property of which the owner might summarily be dispossessed.

City Court.

Special Term—October, 1886.

HERNANDEZ BY GUARDIAN *against* BILLOTTE.

Judgment for costs in action by an infant by guardian *ad litem* must be entered against the guardian.

McADAM, Ch. J.—Where an infant brings suit by guardian *ad litem* and is defeated, the judgment for the defendant's costs should be entered against the guardian, who is personally responsible for them (*Code*, § 469), and the judgment is to be collected from the guardian, by execution or otherwise, in the same manner as though the guardian had been plaintiff in his own right (*Code*, § 3249). These provisions supersede the practice which pre-

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vailed under the old Codes (see notes to section 3249 of *Throop's Code*). The defendant must follow the practice here laid down.

New York Commission of Appeals.

September, 1874.

RICHARD BROWN, APPELLANT, *against* JOHN
McKEE, RESPONDENT.

Opinion of Commissioner Dwight as to party-walls. Validity of oral agreement. When covenants for, run with the land. The question whether the covenant is personal to the builder; or enures to the benefit of his grantee, and whether it is personal to the covenantee, or may be enforced against his grantees, considered. The phrase "use" of a wall and the term "when used" explained. The following is the dissenting opinion in *Brown v. McKee* (57 *N. Y.* 684), and is to be read in connection with the decision as there reported. The acknowledged ability of Professor Dwight, the masterly manner in which the questions involved are discussed, the importance of the subject, and the fact that the opinion is not reported elsewhere, are the reasons which induce its publication now. The court did not disagree with the reasoning of Commissioner Dwight, but put its decision on the ground that the action had been prematurely brought. This opinion is certainly a valuable contribution to the law of party-walls. See foot-note at end of opinion.

Appeal from a judgment of the general term of the supreme court of the first department, affirming a judgment rendered at the special term.

In the year 1854, one David McMaster was owner in fee simple of a tract of land on the southerly side of West Twenty-fifth street, in the city of New York. William A. Cummings was also owner in like manner of a lot on

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the easterly side of McMaster's property, each being of the same depth, viz., ninety-eight feet and nine inches to the center of the block. McMaster entered into an oral agreement with Cummings at the time above specified, whereby he was to erect a party-wall from the street line backwards, towards the rear of the lot about fifty feet, one-half of which was to stand upon the lot of McMaster and the other half upon that of Cummings.

The judge found at the trial that the wall was built upon a verbal agreement between McMaster and Cummings, that the latter, his heirs *or assigns*, should have the right to use the same as a party-wall, and that when *he or they used the same*, he or they should pay McMaster, his heirs *or assigns*, one-half of the value of said wall. There was an exception by the plaintiff to this finding as unsupported by evidence, his claim being that the agreement was, that the value was to be paid at the time of and before the use.

In April, 1867, McMaster conveyed his lot to the plaintiff, with the tenements, hereditaments and appurtenances thereunto belonging. Cummings, in April, 1868, sold to John McElvane, who, in September of the same year, conveyed to the defendant. , McElvane and the defendant respectively had notice of the verbal agreement to build the party-wall, etc., at the time of the respective conveyances to them.

In the month of May, 1869, the defendant commenced to build on his lot, and to cut holes in the party-wall for the purpose of inserting beams therein.

The action was brought to obtain an injunction against the defendant, to prevent him from using the wall without payment, and also to obtain a judgment that he should pay one-half of the value of the wall.

The judge found at the trial, that, after the injunction, the defendant abandoned the use of the wall, to which finding there was an exception as unsupported by evidence.

The judge found as conclusions of law, that the

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plaintiff was not entitled to recover from the defendant the value of the party-wall, and that he was not entitled to an injunction restraining the defendant from the use of the wall as a party-wall. To these conclusions the plaintiff duly excepted.

There were several requests by the plaintiff to find facts in his favor which were refused under exception. The evidence, as affecting these and the findings before referred to, is sufficiently set forth in the opinion. The judgment entered for the defendant, on the decision at special term having been affirmed at the general term, the plaintiff appeals to this court.

Charles H. Woodbury, for appellant.

O. E. Bright, for respondent.

DWIGHT, Com.—The first question to be considered in the present case is as to the ownership of the wall as between McMaster and Cummings. Although the agreement that the wall should stand in part on Cummings' land was oral, yet when McMaster acted on the faith of it, that which was at first an oral contract, void by the statute of frauds, became valid in equity, and gave McMaster a right which Cummings could not recall (*Rawson v. Bell*, 46 Ga. 19). The wall itself, however, belonged absolutely to McMaster. It was composed of his materials and wholly constructed by his labor. Nothing could give one-half of it to Cummings, except the doctrine of *quicquid plantatur solo, solo cedit*. That rule has no application to additions made by one to the land of another with the consent of the owner. It is applied in the case of trespassers, or of additions made by owners themselves. But when the owner of materials attaches them to the real estate of another with the latter's consent, there is neither reason or justice, nor public convenience in a rule which would deprive the owner

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of the materials or his property in them. This proposition is so fully sustained by authority as to become elementary law (*Aldrich v. Parsons*, 6 *N. H.* 555; *Osgood v. Howard*, 6 *Greene*, 452; *Russel v. Richard*, 1 *Fairf.* [10 *Maine*] 429; *Ashman v. Williams*, 8 *Pick.* 402; *Doty v. Gorham*, 5 *Pick.* 487; *Dann v. Dann*, 38 *N. H.* 429, 431; *Mott v. Palmer*, 1 *N. Y.* 571; *Ford v. Cobb*, 20 *N. Y.* 344; *Keyser v. School District*, 35 *N. H.* 480; *Norte v. Borham*, 18 *Ind.* 233; 1 *Washb. on Real Prop.* ch. 1, §§ 4, 4a). If Cummings or his grantees did not use the wall, McMaster and his assigns would, according to these rules, have a paramount right to have one-half of their wall stand on the land of Cummings, as well as of any of his grantees acquiring their interests with notice of the rights of the owner of the wall. The next inquiry is, as to the rights which would have been acquired by Cummings had he used the party-wall. He was under no obligation to do more than permit the wall to stand according to his license. He, however, had a conditional right or privilege, if he saw fit to exercise it, to become the owner of the party-wall by using it. This is to be fairly inferred from the agreement that he was to pay one-half of its value. Had the agreement been written, this would have been clear. Having an election under the arrangement, either to let the wall stand on his land and pay nothing, or to use it and pay half its value, when he elected the latter his rights would have become fixed and the election irrevocable (*Firemen's Insurance Co. v. Lawrence*, 11 *Johns.* 261; *S. C.*, 14 *Johns.* 353; *Com. Dig.* 614). Cases in equity are to be found in *Anstruther*, 229; *Dick v. Barrell*, 2 *Strange*, 1248. The fact that the agreement was oral does not alter the case. The part execution of it takes the case out of the statute of frauds. By the oral agreement, on paying half the value, Cummings was to become the owner of a true party-wall. He was to own not only the one-half standing on his own land, but to have an easement in the portion standing on McMaster's

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land. This is the only rational construction of the contract consistent with justice and a due regard to the rights of Cummings. If the oral agreement is not to be carried out, the result would be that McMaster obtains a valid easement as against Cummings, but Cummings would lose the use of his land and have no corresponding right as against McMaster. The next inquiry is whether the agreement between the original parties is binding on their respective assignees. This may be considered as well as to the doctrine of covenants running with the land as to the rule governing courts of equity independent of that doctrine. I think that the agreement between the parties in the present case resulted in a state of facts which was equivalent to a case of "covenants running with the land." The parol agreement between the parties contemplated a written agreement. One was drawn and never executed, which was shown by the uncontradicted evidence of McMaster to represent the understanding between the parties. This proposed agreement contained a clause that the covenants in the agreement should be deemed to be "covenants running with the land" and binding not only on the immediate parties but on their assigns while owners of the land. If an agreement of an executory nature had been entered into in writing that the parties should make an executed agreement for covenants running with the land, it would have, according to established principles, given each of them a right to such covenants enforceable in equity. There would have, of course, been no covenants on which an action could be brought in a court of law, but equity would have upheld and maintained them. The parol agreement, when carried into execution, is, in spite of the statute of frauds, precisely equivalent in equity to the written agreement. Hence, if McMaster had proceeded against Cummings he must have brought his action in this [supreme] court, for he would have had an equitable and not a legal interest in the covenants running with the land. He would, however,

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have had the same recognition in this court as in a court of law, under the settled maxim that "equity follows the law." The question is then fairly presented whether, if the proposed agreement between these parties had been actually signed, there would have been a case of covenants running with the land.

The great criterion for determining whether a covenant runs with the land or not, is the intention of the parties, provided that the covenant is of such a nature that it can, under any circumstances, bind the land in respect to assignees. Of course, if the covenant is of such a character that it is essentially personal, the provision that it shall run with the land is nugatory (*Masury v. Southworth*, 9 *Ohio St.* 340, 347). It is then necessary to consider whether the covenant in the present case is of such a nature that it can run with the land. It is to be noticed that there is an actual estate in the land in favor of McMaster growing out of the executed parol agreement. True, it is an incorporeal hereditament, an easement, but still an estate. The case, accordingly, bears no resemblance to *Harsha v. Reid*, 45 *N. Y.* 415, where there was a covenant with a third person, having no interest or estate in the land, not to put a grist-mill on certain premises. It was a mere covenant in gross, having no connection with any estate, and it was properly held that it did not run with the land, there being no land with which the benefit of the covenant could run. On the other hand, it granted no interest in the premises and created no charge thereon. The case of *Cole v. Hughes* (54 *N. Y.* 444) has not been overlooked. The learned judge who delivered the opinion in that case states that he finds no case in conflict with the view that the right to compensation in such cases is personal to the first builder, and is a mere chose in action which does not pass to the grantee of the land. Reference may, however, be made to the following authorities, among others: *Savage v. Mason*, 5 *Cush.* 500; *Weyman v. Ringold*, 1 *Bradf.* 40; *Brown v. Penz*, 1 *Ct. of*

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App. Dec. 227; *Keteltas v. Penfold*, 4 *E. D. Smith*, 122. *Savage v. Mason* is a very distinct authority. There was a partition of a large number of lots with covenants that the center of party-walls might be placed on the lines dividing lots from contiguous lots, and that the owner of a contiguous lot whenever he should make use of any such wall in any building, should pay for one-half of the wall by him so used. There was a plainly expressed intention in the partition deed, that the covenant should run with the land. The court said, there was a privity of estate between the contracting parties in the land to which the covenant was annexed. The covenant is in terms between the parties and their respective heirs and assigns; it has direct and immediate reference to the land; it relates to the mode of occupying and enjoying the land; it is beneficial to the owner as owner, and to no other person; it is, in truth, inherent to and attached to the land and necessarily goes with the land into the hands of the heir or assignee. In *Weyman v. Ringold*, the subject was discussed at length and in a learned and comprehensive manner by the late Surrogate BRADFORD. It was held that a covenant to pay W., his executors, administrators and assigns, one-half the value of a party-wall about to be built by W., when used by the covenantor, there being an express agreement that the covenant shall bind the land and the owners thereof for the time being, enures to the benefit of the grantee of the land of the covenantee, and the executors of the covenantee have no interest therein. It will be observed that this case only decided that the *benefit* of the covenant would enure to an assignee of the owner of the covenant. It was not necessary to decide that the *burden* would attach to the land while owned by the assignee of the covenantor, though the surrogate expresses a strong opinion upon that point that it would where there is an estate in the land. The cases are extensively collected on p. 34 of the report.

In *Keteltas v. Penfold*, 1 *E. D. Smith*, 122, the point

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was decided that the burden of the covenant would run with the land as against the assignee of the covenantor. In that case, there was an agreement by A., giving a right to construct a party-wall, one-half thereof upon his lot, and covenanting for himself, his heirs and assigns, whenever he should erect a new building, to pay B., his heirs and assigns, a moiety of the value of such portion of the wall as he should use. This was held to be a grant of an easement or incorporeal hereditament, and that the covenant connected with it binds and is a charge upon the land. It was decided accordingly, that the devisees of the land were liable as assignees to the burden of the covenant made by their devisor. The same ground is ruled in *Wickerham v. Orr*, 9 *Iowa*, 254.

There has been much controversy, with a tendency to confusion, growing out of an attempted distinction between the benefit of a covenant and the burden of it as affecting assignees. The truth is that there is no valid distinction between them. Both will pass to an assignee as incident to an estate; neither will pass without it. This point met with exhaustive discussion in the great cases connected with the Van Rensselaer estate (*Van Rensselaer v. Hays*, 19 *N. Y.* 68; *Same v. Read*, 26 *Id.* 558; *Same v. Slingerland*, *Id.* 480; *Same v. Dennison*, 35 *Id.* 393; *Same v. Barrington*, 39 *Id.* 9). *Van Rensselaer v. Hays* expressly decided that the burden of a covenant to pay rent passed with the land as an incident to it, though there was no reversion in the grantee (pp. 87, 99).

The court was in doubt whether the benefit of the rent would pass to an assignee in such a sense that he could recover upon it in an action of covenant at law, and independent of the statute (Laws of 1805, c. 98). In *Van Rensselaer v. Read*, *supra*, the court resolved the doubt that attended the case of *Van Rensselaer v. Hays*, holding that the legal right of action on a covenant for payment passes to the assignee of the rent at common law, and independently of the act of 1805. It was decided that the

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action was maintainable on the privity of estate between the grantee of the rent and the grantee of the land out of which the rent issues, though there is no reversion in the grantor. These authorities establish that the burden of a covenant will run with a corporeal estate in the land, and the benefit of it with an incorporeal one. They do not specifically decide the point that the burden of the covenant will pass with an incorporeal hereditament. They do, however, affirm this in principle. In 26 *N. Y.* 576, it is said, "All the reasons for holding covenants assignable apply with equal force to covenants relating to incorporeal hereditaments;" and again, on p. 577, "it is a settled proposition that covenants may run with incorporeal as well as with corporeal hereditaments" (*Bally v. Wells*, 3 *Wilson*, 26; *Mayor of Congleton v. Pattison*, 10 *East*, 130; *Keteltas v. Penfold*, *supra*; *Platt on Covenants*, 469).

The attempted distinction between the assignability of a covenant, as it respects the benefit and the burden of it, is disapproved by Mr. *Washburn* in his work on Real Property (vol. 2, p. 262, 3 ed.). After referring to the doctrine, he says: "The point has never been determined in this way by a full court, though assumed by individual judges, and, respectable as the opinions in its favor may be, the doctrine contended for is opposed to well-settled principles, as well as the highest authority." He then proceeds to say that the whole subject of assignability depends on privity of estate, and that this has been the rule from the time of *Webb v. Russell* (13 *Penn.* 393) to the present day. It has been sufficiently shown in the earlier part of this opinion that, in the present instance, an estate of an incorporeal nature existed between the parties. The builder of the wall gained an easement on the land of his neighbor; the latter, on electing to pay for the use of the wall, had an easement on the land of the builder. These were permanent interests, and of such a nature that the benefit and burden of covenants might

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run with them. The case thus bears no resemblance to *Hart v. Curtis* (19 *Pick.* 459), where the owners of adjoining estates entered into mutual covenants as to the wheels that they would use in their respective mills. It was rightly held that these did not bind assignees, as there was no privity of estate of any kind whatever. *Weld v. Nichols* (17 *Pick.* 538) is meagerly reported, and probably turned on some express covenant controlling the rights of the parties. If it maintains any such doctrine as that a covenant to pay for a party-wall will not run with the land in the absence of special provisions to the contrary, it is in opposition to a later and carefully considered case already referred to, in the same court (*Savage v. Mason*, *supra*), and must be deemed to be overruled. *Block v. Isham* (16 *Am. Law Reg.* 8) depended wholly on *Weld v. Nichols*, and must share its fate.

The cases in Pennsylvania, properly considered, do not conflict with the view that covenants of this nature run with the land (*Todd v. Stokes*, 10 *Penn. St.* 155; *Gilbert v. Drew*, *Id.* 219; *Dauids v. Harris*, 9 *Id.* 503; *Inglis v. Bringhurst*, 1 *Dallas*, 341). In *Todd v. Stokes* the question was whether the right to collect the money stipulated to be paid for the use of the party-wall was assignable with the land, or whether it belonged to the first builder. The decision turned upon the language of a statute which will be hereafter considered. The same remark may be made of *Gilbert v. Drew* and *Dauids v. Holmes*. The statute referred to was passed February 24, 1721, and was made applicable to the city of Philadelphia. It provided that the "first builder of a party wall shall be reimbursed for one moiety of the charge of it, or for so much as the next builder shall use, before he breaks into the wall." In construing this statute, the sole inquiry was not as to any agreement between the parties, as in the present case, but simply as to the legal force of the statutory expressions.

In other words, what did the phrase "first builder"

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mean? Plainly, it could mean nothing but the person who erected the wall. However inequitable the construction might be, the court was tied down by the phraseology of the statute. The legislature, on the other hand, by its *fiat*, made the burden of the covenant follow the land, since it provided that the "second builder" should pay, no matter how remote a purchaser of the adjoining lot he might be. The awkward result of an ill-considered statute has been wholly done away with by a recent act, April 10, 1849, that provides that, "in all conveyances of houses and buildings, the right to, and compensation for, the party-wall built therewith, shall be taken to have passed to the purchaser, unless otherwise expressed, and the owner of the house for the time being shall have all the remedies in respect to such party-wall as he might have in relation to the house to which this attached."

In commenting on this statute, the Pennsylvania court said, in *Knight v. Ranken*, 30 *Penn. St.* 574, that "*this made the interest to be in law, what it always was in fact, an interest in the realty, and not a mere personal right.*" There can be no stronger possible evidence that the court in the earlier cases felt itself bound by a harsh statutory rule, the effect of which it could not avoid, as in a case governed by a like principle in this court (*Rosenplanter v. Roessle*, 54 *N. Y.* 262). It is, accordingly, my view, in the present case, that the covenant to pay for a party-wall when used, may run with the land, and bind assignees of the covenantor. There will be no controversy on the point that the assignee of McMaster will take the easement appertaining to him, and with it the benefit of the covenant. The easement would pass under the word "appurtenances" in his deed (3 *Washb. on Real Prop.* 340, §§ 25, 32, 3 ed.; *Gayetty v. Bethune*, 14 *Mass.* 49; *McDonald v. Laidall*, 3 *Rawle*, 492; *Jackson v. Hathaway*, 15 *Johns.* 427).

There is still another aspect from which this question may be regarded. This concerns the rights and obliga-

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tions of the parties in a court of equity. In that court, the great point in determining whether the assignee is liable is, whether he had notice of the agreement between the original parties. It is immaterial whether there be a technical covenant running with the land or not. This point was not at all involved in the case of *Cole v. Hughes*, and is still open to full consideration.

LORD BROUGHAM, in the case of *Keppell v. Bailey* (2 *Myline & K.* 517), gave utterance to a *dictum* upon this subject which has led to much confusion. He said: "The knowledge by an assignee of an estate that his assignor had assumed to bind others than the law authorized him to affect by his contracts, and had attempted to create a real burden upon property which is inconsistent with the matter of that property and unknown to the principles of the law, cannot bind such assignee by affecting his conscience."

This has been interpreted by some to mean that, unless the covenant is of such a nature as to "run with the land," in the view of a court of law, knowledge of its existence will not, in a court of equity, bind an assignee. This conclusion was emphatically repudiated in *Tulk v. Moxbury* (2 *Phillips*, 775-779). The lord chancellor accordingly said, "With respect to the observations of LORD BROUGHAM in *Keppell v. Bailey*, he never could have meant to lay down that this court would not enforce an equity attached to land by the owner, unless under such circumstances as would maintain an action at law. If that be the result of his observations, I can only say that I cannot coincide with it." The proposition which was established in the case was that a covenant between a vendor and purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land so as to be binding upon subsequent purchasers

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at law. *Tulk v. Moxbury* has been confirmed repeatedly in this respect, and has become settled law, Lord Brougham's dictum as interpreted in that case having been uniformly received with marked disfavor in the English courts (*De Mathas v. Gibson*, 4 *De Gex & Jones*, 276; *Wilson v. Hart*, *Law Rep.* 1 *Chan.* 363; *Colt v. Pawle*, 4 *Id.* 654; *Whatman v. Gibson*, 9 *Sim.* 196; *Cole v. Lewis*, 5 *De G. M. & G.* 1; *Western v. McDermot*, *L. R.* 2 *Ch. App.* 12; *Parker v. Nightingale*, 6 *Allen*, 341). The spirit of the rule is well explained by Lord Justice KNIGHT BRUCE in *De Mathas v. Gibson*, *supra*. He says: "Reason and justice seem to prescribe that, at least as a general rule, where a man by gift or purchase acquires property from another with knowledge of a previous contract, lawfully and for a valuable consideration made by him with a third person, to use and employ the property for a particular purpose and in a specified manner, the acquirer should not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller, from whom he derives his own title" (p. 282). In *Parker v. Nightingale*, the whole subject is carefully considered by BIGELOW, Ch. J., and the distinction between the rule in law and in equity clearly pointed out. It is there said: "A court of chancery will recognize and enforce agreements concerning the occupation and mode of use of real estate, although they are not expressed with technical accuracy, as exceptions or restrictions out of a grant, nor binding as covenants real running with the land. Nor is it at all material that such stipulations should be binding in law, or that any privity of estate should subsist between parties in order to render them obligatory, and to warrant equitable relief in case of their infraction. . . ." So long as an owner retains a title in himself, his covenants and agreements respecting the use and enjoyment of his estate will be binding upon him personally, and can

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be specifically enforced in equity. When he disposes of it by grant or otherwise, those who take under him cannot equitably refuse to fulfill stipulations concerning the premises of which they had notice. It is upon this ground that the courts of equity will afford relief to the parties aggrieved by the neglect or omission to comply with agreements respecting real estate after it has passed by *mesne* conveyances out of the hands of those who were parties to the original contract. A purchaser of land, with notice of a right or interest in it existing only by agreement with his vendor, is bound to do that which his grantor had agreed to perform, because it would be unconscientious and inequitable for him to violate or disregard the valid agreements of the vendor in regard to the estate of which he had notice when he became the purchaser (*Burrows v. Richards*, 8 *Paige*, 351. See, also, *Whitney v. Union Railway Co.*, 11 *Gray*, 364). In applying the principles to the case at bar, it will be found that the defendant, having had full notice of the arrangement between McMaster and Cummings, is bound in conscience not to avail himself of the privilege of the agreement without bearing the burdens. His claim, in substance, is that he can rest his beams on another man's wall and pay nothing for it to any one, for if the burden of the covenant does not, either in law or in equity, follow the land, he liable to no one. The same general course of reasoning shows that the benefit of the covenant in equity no longer appertains to McMaster, but enures to the plaintiff. When McMaster conveyed, the *entire* wall passed to his grantee, together with the easement. When the defendant makes use of the wall, he takes not McMaster's property (which has already passed from him), but the plaintiff's. He cannot avail himself of the agreement to take the wall without being equitably bound to pay him who is the owner at the time he appropriates it. This point was decided in this court in *Brown v. Penz*, 1 *Ct. App. Dec.*

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227. That was an action in equity in which it was held that the equitable benefits and obligations of a party-wall agreement, such as is now in question, attached to the assignees of the respective parties. It is said by the reporter to have been disposed of by an equally divided court. Our brother, Judge HIRAM GRAY, who was a member of the court when the decision was rendered, dissented from the prevailing view, and remembers that it was a decision by a majority. It is binding as an authority and is founded on good sense and convenience. It is a matter of common knowledge in the city of New York that such agreements are much resorted to by professed builders and others, and great practical injustice would be done if the party who has incurred a large expenditure to build an entire wall should be deprived of all remedy against an assignee of a contiguous proprietor with whom a well understood contract was made. It is believed that a decision that the assignees of the original contracting parties are not within the scope of the contract, either in law or equity, would be an unwelcome surprise to the profession. Assuming it now to be established that the covenant in the case at bar binds the assignee, the next inquiry is as to its true scope and meaning. The judge at the trial found that the agreement was that Cummings, or his assignees, should have the right to use the wall as a party-wall, and that, when he or they used the same, he or they should pay McMaster, his heirs or assigns, one-half of the value of said wall. The terms of the unexecuted written agreement were, "if the party of the second part, etc., shall at any time use the said wall, he or they shall then pay to the party of the first part the value of one-half of such part as shall be used. McMaster testified that the oral agreement was that Cummings, etc., was to pay before he used the wall, not after he had elected to use it; that his experience as a builder had always been to that effect, and that Cummings was not to put a chisel into the wall until

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he had paid for it. He further testified that the proposed written agreement was drawn to carry out that understanding, by one of his clerks. Cummings was not sworn. The plaintiff insists that the finding of the judge was unsustained by evidence, and was, therefore, erroneous in point of law.

If the unexecuted written instrument be assumed to be the true expression of the intent of the parties, its fair construction is, that payment was to be made as soon as the election to use the wall became fixed and irrevocable, as shown by the defendant's outward acts of taking possession. It is unnecessary to indulge in nice and subtle criticism of the word "use," as employed by the parties. A reasonable and ordinary meaning must be attached to it. Johnson, in his *Dictionary*, defines the word "use" as "to employ for any purpose." Such use may be temporary or permanent. I may "use" my neighbor's carriage for a single day. So one may have to "use" his wits in a single instance, or to "use" his right rather than his left hand in throwing a stone, or "use" a trumpet in calling together an assembly. It is plain in all these instances that it means to employ for a purpose, and nothing more; so, when the defendant put his beams upon this wall, he employed it for a purpose, he used it (*Brown v. Penz*, 11 *N. Y. Leg. Obs.* 29). Any other construction would lead to most unsatisfactory conclusions. If it means anything more than this, the defendant might put up one building and take down another, and so on successively, without paying anything for the employment of the wall for his purpose. I do not see how he would pay anything until the whole capacity of the wall to render support had been exhausted. This would make the word "use" equivalent to "use up" or destroy. From the best reflection that I can give to the subject, I think that the defendant's use of the wall by inserting beams in it and the payment of half its value were concurrent acts.

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While he had a clear right to use the wall, that right was conditional upon payment.

It is now necessary to inquire whether the defendant, having wholly refused to pay, and being at the same time engaged in constructing a building on his lot and also using the plaintiff's wall, could be restrained by injunction. It has already been shown that the wall, until Cummings or his assigns elected to make use of it under the agreement, was wholly the property of McMaster. The entire interest passed by his assignment to the plaintiff. It would be an unreasonable and a violent interpretation to hold that McMaster intended to retain the one-half of the wall standing on Cummings' land, as it could be of no possible use to him. It must stand there permanently to give the plaintiff the benefit of the easement which he had on the land formerly belonging to Cummings and now owned by the defendant. The property in the wall accordingly passed to the plaintiff as an incident to his grant, and as appurtenant to his estate, having thus the complete ownership of the wall vested in him. The defendant could only make use of it by payment according to the agreement. Prompt payment might be waived by the plaintiff. On the other hand, it might be insisted upon. In that case, the defendant might perhaps be treated as a trespasser or wrongdoer. So, it would seem that the plaintiff might take this position towards the defendant. You have elected to make use of my wall, which has now become a party-wall. There is an easement in your favor on my land, as well as one in my favor on your land. I insist that you shall, on equitable grounds, contribute to pay one-half of its value, and until that is done, and, as part of the relief to which I am entitled, you should be temporarily restrained from further proceedings. You shall not avail yourself of the benefit of the contract between our grantors except by taking it *cum onere*.

This was no hardship upon the defendant. It cannot

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be contended, with any show of reason, that he was prevented by the injunction from using the wall. The restraint was only subordinate to the general relief. He could at any time relieve himself from it by doing his duty and paying for the wall which he was using. If he was influenced by the erroneous idea that he could use another man's wall without paying for it, and that, having once used it, he could at pleasure abandon it, he must attribute any loss which he may sustain to his mistaken view of the law. He cannot be said to be prevented from the use of the wall when he himself has created the obstacle which stands in the way. No stress should be laid on the fact that the wall of the plaintiff was, to some extent, made use of in the support of a temporary building standing on the defendant's lot. It is clear, from the evidence, that the use was by a mere tenant without the sanction of the landlord and without the knowledge of the plaintiff or his grantors. If the case is to be governed by the law of covenants running with the land, the act of the tenant was no breach of it. He must be regarded as a stranger committing a wrongful act—as a mere trespasser. If it is to be disposed of under the rules of equity, it is plain that the equitable obligation of the defendant can only be discharged by making payment for the wall when he himself used it. The temporary use by the tenant, expiring with his tenancy, and without the plaintiff's knowledge, would have no tendency to relieve him from an obligation based on solid foundations of justice and equity. The judge at the circuit accordingly erred in his conclusions of law in holding that the plaintiff was not entitled to recover from the defendant the value of the party-wall. There should be a new trial granted, with costs to abide the event.

Explanatory Letter from the Plaintiff's Counsel.

NEW YORK, January 18, 1888.

HON. DAVID MCADAM.

Dear Sir: I did not notice till this morning that you requested the opinions in *Brown v. McKee*. I never had any other than DWIGHT'S
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opinion. I have always understood, however, that the decision was placed upon the ground that the action was prematurely begun ; that the agreement between the original parties was that the obligation to pay did not arise until the adjoining owner *used* the wall, and as I began the action after he had made holes for two tiers of beams and inserted the beams for but one tier, and obtained an injunction restraining him from any further use until he paid for so much of the wall as he intended to use, I had prevented him from using the wall, and so was not entitled to maintain the action. I should have waited until he had *used* the wall and brought an action for the value of the wall. This is, as I understand, the prevailing opinion of the court.

I am, yours truly,

CHARLES H. WOODBURY.

Editor's Note.

In *Scott v. McMillan* (76 *N. Y.* 144), Judge DANFORTH said: "In the case of *Brown v. McKee*, the plaintiff's rights were not considered, the court holding that whatever they might be, no cause of action had accrued "

In *Bedell v. Kennedy* (88 *Hun*, 510), the grantee of the covenantor was held to be liable for the value of the one-half of the party wall.

In *Hart v. Lyon* (90 *N. Y.* 668), following *Cole v. Hughes* (54 *N. Y.* 444), *Scott v. McMillan* (76 *N. Y.* 141), the court hold the right and liability to be personal.

See, also, *Squier v. Townsend* (2 *City Ct. R.* 142). The more one reads and considers the opinion of Prof. DWIGHT in the *Brown v. McKee* case, the more he becomes impressed with its logical force.

City Court.

Special Term—October, 1886

HALSEY *against* McCALLUM.

Costs after consolidation of actions. The costs of one action only taxable.

McADAM, Ch. J.—After the order for consolidation there was but a single suit pending, and the costs of but a single action can be included in the judgment. The de-

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fendant has offered a bill of costs for taxation, claiming in each of the actions originally commenced, \$10 costs by statute before notice of trial and one bill of costs for subsequent proceedings. The clerk disallowed one of the items of \$10. This was proper. The object of consolidation is to curtail the costs, and it is always competent for the court to order the consolidation on terms, one of which may be the saving to the successful party of the costs already incurred in the suits which are to be dropped (see *Blake v. Michigan S. R. R. Co.* 17 *How. Pr.* 228). No such provision was made in this case.

Taxation affirmed.

City Court.

Trial Term—November, 1886.

SMITH ET AL. *against* FOX.

Compound interest not allowable. The mode of computation, stated.

McADAM, Ch. J.—Interest upon interest, or compound interest, is not allowable, except in special cases (see authorities collated in 4 *Abb. New Dig.* 12, §§ 155, 156, 161). The plaintiffs may be allowed simple interest, which on their demand aggregates \$487.89, and may credit the defendant with simple interest, which, on his payments, aggregates \$250.33, leaving a balance of interest amounting to \$237.06 due them. If the plaintiffs do not assent to this, they must follow the rule in regard to the effect of partial payments laid down by the supreme court of the State in a number of cases which will be found cited in 4 *Abb. Dig. (supra)*, § 150, and in Cowen's Treatise, Kingsley's ed. § 1527. In the work last cited,

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the rule is illustrated and simplified by examples which make it clear. The jury have fixed the amount of the balance due for principal, and I will adjust the interest account on whichever of the two principles last suggested the plaintiffs may elect to adopt.

The Rule Above Referred to.

When partial payments have been made on the debt from time to time, the rule adopted by the supreme court of the State is, to calculate interest on the principal up to the time when the payment has been made, add this interest to the principal, and then deduct the payment, without regard to the time when made, whether before or after the expiration of the year. This, however, is only in cases where the payment exceeds the interest due; otherwise it will be taking interest upon interest. When the payment falls short of the interest due, interest must be calculated on the principal up to the time when the payments will overrun the interest due on the principal debt; and the deduction then be made (3 *Ow.* 86, 87, *note*; also, 3 *Iowa*, 76; 9 *Id.* 376). The rule was laid down by Chancellor KENT as follows: "When partial payments have been made, apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes toward discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied toward discharging the principal, and interest is to be computed on the balance of the principal as aforesaid (1 *Johns. Ch.* 17). The same rule prevails in California (3 *Cal.* 231; 85 *Id.* 692), Iowa (9 *Iowa*, 376), Minnesota (5 *Minn.* 508), and Indiana (28 *Ind.* 488). In Ohio, a slightly different rule prevails (17 *Ohio N. S.* 11).

Schumacher v. Reichardt.

City Court.*Trial Term—January, 1887.***HENRY SCHUMACHER *against* GEORGE
REICHARDT.**

Construction and effect of condition in deed as to character of buildings to be erected by grantee.

A covenant not to build a rear house is not broken by the erection of a building facing on the side street and having its entrance there. Such a building is not a rear house within the meaning of the covenant.

See Note at end of case in reference to discharging covenants.

The defendant, by written contract dated July 9, 1886, agreed to convey to the plaintiffs, for \$50,700, the lots 939 and 941 Second avenue (situated on the north-west corner of Second avenue and Fiftieth street, being 44 feet 4 inches in width on the avenue and 80 feet in depth on the street), covered with three houses, two facing the avenue and one facing Fiftieth street. The plaintiff has declined to take title, alleging as a defect the violation of a covenant contained in a deed from James W. Beekman to Samuel W. Dunscomb, through whom the defendant received title. The covenant provides that the grantee shall not erect or suffer to be erected on the hereby granted premises or any part thereof, any building other than of brick or stone, "nor at any time erect, or cause, procure, permit or suffer to be erected upon the rear of the lot or lots hereby conveyed, or any of them, any building to be used or occupied as a dwelling-house or habitation." A similar covenant is contained in all deeds of property comprised in the Beekman farm, of which the lots in question formed a part, and the right

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to enforce the restriction passed, it is claimed, to the adjoining owners, all of whom derived title from the same source. The plaintiff claims that the erection of the building on Fiftieth street violates that portion of the covenant designated by quotation marks, and insists that the title, otherwise good, has by such violation been rendered defective and consequently unmarketable. The action is to recover back the deposit of \$1,000 paid on the execution of the contract, with \$150, expenses of examining the title.

Frederick A. Botty, for plaintiff.

Frank Schaeffler, for defendant.

McADAM, Ch. J.—A condition such as can determine an estate, is a provision of a punitive character, secured to the reversioner for the purpose of enabling him to enforce a faithful performance by the grantee of his duties. Failure to perform does not terminate the estate. It only enables the grantor to terminate it if he chooses, as the penalty for the breach. If he does not so elect, the estate continues (*Nicoll v. N. Y. & Erie R. R. Co.*, 12 *N. Y.*, 121; *McMahon v. Allen*, 35 *N. Y.*, 409; *Towle v. Remsen*, 70 *N. Y.*, 312. The adjoining owners cannot sue at common law on the covenant; yet, as it was intended for their benefit, a court of equity would interpose to give them relief by injunction against its infraction (*Gilbert v. Peteler*, 38 *N. Y.*, 168).

The restriction in the deed could only be enforced on the part of Beekman, the grantor, by entry, or by the neighboring owners on their application for a writ of injunction. Beekman has not asserted his right of entry, nor have the neighboring owners attempted to enjoin the erection of the house (long since completed) on the side street, so that, judged in the light of their conduct, neither construes the erection as a violation of the covenant. The lots were unimproved when Beekman conveyed them to

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Dunscomb, and there is nothing in the covenant limiting the depth of the houses to be built by his grantee; so that the claim that the adjoining owners acquired an easement to light and air across the rears of the lots is without basis. The grantee had the right to build over the entire lots without offending against the covenant, which was evidently aimed at the erection of rear tenement houses. This was the objectionable feature sought to be inhibited—nothing more.

The lot in question had a frontage on Fiftieth street, as well as on Second avenue, and as the covenant did not restrict the number or size of the buildings to be erected, the grantee had the right to build on either frontage in the way most advantageous to himself, so long as the houses were constructed of brick or stone; and the three houses answer this requirement. The house on Fiftieth street has its frontage and entrance there, and is not by legal interpretation a rear tenement, but an independent building, having a lot carved out of the purchase appropriated to itself. The grantee has in effect availed himself of his legal right as owner of the fee to cover almost the entire lots with buildings, and as he has not erected a rear tenement, within the meaning of that term as used in the covenant, Beekman has no right of entry for condition broken, nor have the adjoining owners any remedy by injunction.

There is therefore no defect warranting the rejection of the title, and the plaintiff is, consequently, without any cause of action.

Conditions leading to forfeiture or restricting the free use of property for lawful objects are strictly construed, because they tend to impair and destroy estates. They will not be sustained by inference nor unless the plain language of the covenant requires that punitive result (*Woodworth v. Paine*, 74 *N. Y.* 199; see also 64 *N. Y.* 33; 2 *How. Pr. N. S.* 391).

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It follows, therefore, that the defendant is entitled to judgment, with costs.

Release of covenants—distinction between those contained in deed and lease.

The vested rights of an owner of property under a covenant against certain erections by his neighbor, cannot be waived or discharged by the acts of their common grantor (23 *Moak's Eng.* 838, and note). This is upon the principle that where one has parted with his interest in the land, he parts also with all right to or control over the covenants which run with it (*Rawls on Coves.* 359). A release of such covenants, made after an absolute conveyance of the property, would be as ineffectual against the purchaser as a second conveyance of the land itself would be (*Id.* 367).

Where, however, as in the case of a lease containing like covenants, the lessor retains the fee, he may, by virtue of his ownership, release the tenant from the covenants or convey the land to him discharged from them, or the owner of the fee may by express act or by his conduct waive any of the conditions inserted in the lease for his benefit.

Effect of change of the neighborhood.

Where a court of equity has jurisdiction to enforce the performance of covenants made by owner of land in a city with an adjoining owner, as to the class of erections, etc., and there has been such a change in the character of the neighborhood as to defeat the objects and purposes of the agreement, and to render it inequitable to deprive such owner of the privilege of conforming his property to that character, such relief will not be granted (*Trustees of Columbia College v. Thacher*, 87 *N. Y.* 311).

Effect of provision as to liquidated damages.

The covenant will be enforced, notwithstanding a provision for liquidated damages in case of breach (*Phenix Ins. Co. v. Continental Ins. Co.*, 87 *N. Y.* 400).

City Court.

*General Term—February, 1887.*ALEXANDER FRASER *against* CHARLES E. WARD.

When an order made at special term relates wholly to a fund belonging to the attorney, and the attorney is defeated, he, and not the client, should appeal from the order. If, however, the order is correctly described, and is subscribed by the attorney interested, the notice of appeal may be amended in form, so as to give the court power to review the order on the merits.

Motion for re-argument of appeal.

E. P. Wilder, for motion.

Flanders & Tuttle, opposed.

McADAM, Ch. J.—A re-argument is applied for on the ground that the appeal herein was taken by the plaintiff, who has no interest in the order appealed from, when it should have been taken by his attorneys, who alone were interested therein.

The appeal is taken "by the plaintiff," but it is subscribed by the attorneys, who are the parties in interest.

The notice correctly describes the order appealed from, gives its date and purport, so that an appeal from the particular order in question, signed by the parties in interest, was certainly taken. It is informal only in stating that "the plaintiff" appeals, instead of declaring that "they," the attorneys, appeal.

An error of a more serious character was disregarded in *McLachlin v. Brett* (27 *Hun*, 18). In that case the appellants, claiming to have become the owners of the cause of action, moved to have the action revived and continued in their names as successors in interest of the de-

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ceased plaintiffs. The motion was denied at special term. In the notice of appeal, the appellants inserted their names *instead of the names of the original plaintiffs*. The general term on the hearing of the appeal, *held*, that if the notice was not sufficient, the general term had the power to amend the assumed title to the original title of the action so as to cure the alleged defect. The general term not only asserted the existence of the power, but declared that it was *its duty* to allow the amendment under the circumstances, the parties in interest being before the court, though perhaps informally. The same duty falls upon us. The general term in that case declined to dismiss the appeal, and reversed the order appealed from, upon the merits. Unless it is to be believed that, for some reason or other, this court must be more technical and exacting than the supreme court, its rules of practice ought to be a safe guide for this court to follow.

Under the circumstances, the notice of appeal may be amended *nunc pro tunc*, by inserting therein as appellants the names of the attorneys, the real parties in interest; the costs of appeal allowed in the original order of affirmance will be stricken out, and the motion for re-argument denied, without costs.

Settle order on three days' notice.

NEHEBAS, J., concurs.

City Court.

Trial Term—February, 1887.

GEORGE BURCHILL, ET AL., *against* EDWARD
RAFTER.

The plaintiffs, who are real estate brokers, were employed by the defendant to find a customer for a valuable lease held by him. His

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equity was large and was to be paid for in cash or secured by "real estate security." *Held*, that the term "real estate security" meant by mortgage on real estate, and that a bond by a real estate owner was insufficient.

Further, that the brokers, not having found a person willing to secure the equity by mortgage on real estate, were not entitled to brokerage.

Trial by the court without a jury.

Earley & Pendergast, for plaintiffs.

J. M. Fitzsimons, for defendant.

McADAM, Ch. J.—In the spring of 1886, the defendant held a lease of the store on the south-east corner of One Hundred and Twentieth street and Third avenue, which had a little over nine years to run. The rent reserved in it was \$2,000 per year. It was a valuable lease. It was purchased by the defendant for \$4,800 and he was offered \$1,800 for his bargain. The plaintiffs as brokers were employed by the defendant in respect to the lease, and the only question in dispute is as to the terms and conditions of that employment. The brokers found Mallon & Becannon persons willing to take the premises at \$3,500 per year, a price satisfactory to the defendant.

A question then arose whether Mallon & Becannon should take a sub-lease or an assignment of the one held by the defendant. It was finally assumed and tacitly agreed that a sub-lease could not be made, on account of a covenant against sub-letting contained in the lease, and that an assignment of the original term would be necessary.

This proved agreeable to all parties, and the transaction fell through solely because of the refusal by Mallon & Becannon to give security for the defendant's equity in the lease, in the form of a lien on real estate.

The defendant's equity in the lease would be the difference between \$2,000, the rent reserved by the original lease, and \$3,500, the sum agreed to be paid by the

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new arrangement offered by Mallon & Becannon. This difference of \$1,500 for nine years would aggregate \$13,500 for the term—quite an item.

The defendant did not want to part with his property, reserving no control over it, without good security that his equity would be forthcoming. He was willing to take it in installments, the same as the rent was payable, or he would take a sum in gross and end his part of the transaction. The installment plan was agreeable to all, but the paid-up plan did not suit Mallon & Becannon. It was an unusual proposition and they were justified in declining it.

The installment plan, however, was satisfactory, and if the security by real estate lien had been given, the transaction would have been consummated.

The security plan of "lien" on real estate, was unusual, but not more so than the transaction itself.

Mallon & Becannon offered to give "James Everard," the brewer, as security. He was a man of character, of responsibility, and a real estate owner. He was acceptable to the defendant, who insisted, however, on having Everard give him a mortgage on some real estate to make the payments sure; the defendant remarking that a person good to-day may not be as satisfactory nine years afterwards.

The conditions were severe; but if the plaintiffs assented to them at the time of their employment, they cannot recover without proving that the persons they procured were willing to comply with them. Burchill, one of the plaintiffs, admits all through his testimony that the employment was conditional on obtaining "real estate security" for the rent (\$3,500 per year), but contended that this condition was satisfied by furnishing a responsible real estate owner to go on a bond for the security of the money. The term has acquired that meaning in connection with certain "bail bonds," but is not necessarily so restricted in its general application.

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The testimony of the defendant and of Mr. Fitzsimons (a reputable and disinterested witness) shows that the defendant did not use the words in the limited sense given to them by Burchill. The defendant testifies that he said "mortgage lien on real estate," and the testimony of Mr. Fitzsimons shows that he emphasized upon this point in minute detail. This understanding of the term by the defendant was evidently not an after-thought, for he was emphatic on that point and not unreasonable in regard to the security so long as it was on real estate.

He offered to take a second mortgage, and was willing to take one from each of the proposed customers for half the amount, if agreeable to them. The term "real estate security," within the sense in which that term was used by the defendant in employing the plaintiffs, was "real estate security by lien thereon," and if the plaintiffs did not so understand it, the minds of the parties did not meet in regard to the employment, and, as the efforts of the plaintiffs did not result in consummating the transaction upon which they were engaged, there can be no recovery. The plaintiffs evidently did all they could to bring about a result, and it is unfortunate for them that it was not reached; but the rule is settled that no matter how much time a broker spends or what expense he incurs, he is without redress unless he consummates the object of his employment according to its terms.

Under the circumstances, there must be judgment for the defendant, with costs, but without any allowance in addition thereto.

Albrecht v. Johnson.

City Court.

Trial Term—February, 1887.

ALBRECHT *against* JOHNSON.

Accord and satisfaction—receipt in full. The payment of a portion of an undisputed account, and the giving a receipt in full does not preclude the creditor from recovering the balance unpaid.

The circumstance that the debtor borrowed the money to make the supposed settlement does not alter the legal effect of the transaction.

McADAM, Ch. J.—The law is settled that where, upon payment of a portion of an undisputed account, the creditor gives a receipt in full, he is not concluded thereby from recovering the balance, although the receipt was given with full knowledge (*Ryan v. Ward*, 48 *N. Y.* 204; *Miller v. Coates*, 66 *N. Y.* 609; *Williams v. Carrington*, 1 *Hill*. 515). The receipt expresses no consideration for the discharge other than the “part payment” aforesaid, which does not sustain the plea of “accord and satisfaction.” The fact that the defendant previously had a “standing credit” of \$2,000 with the plaintiffs does not alter the result, as no stated time of credit was given and the money was demandable at any time. Nor does the circumstance that the defendant borrowed the money to pay the \$2,000 alter the legal effect of the transaction (*Bunge v. Koop*, 5 *Robt.* 1; *aff’d*, 48 *N. Y.* 225). The rule, although called “rigid and unreasonable” (5 *Johns.* 271), and characterized as “technical and not well supported by reason” (14 *Wend.* 116), has become so firmly entrenched in our system of jurisprudence that it is idle now to question either its soundness as law or its propriety as a controlling guide in the administration of

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justice. The verdict was properly directed, and the motion for a new trial must be denied.

Affirmed on appeal by city court, general term, and by the common pleas general term. See also *Bliss v. Schwartz*, 65 *N. Y.* 451; and incidentally, *Keeler v. Salisbury*, 38 *Id.* 658; *Platt v. Walworth*, *Lalor's Suppl.* 59.

If the debt be compromised before it is due, the accord is binding as an executed accord and satisfaction (2 Cowen's Treatise by Kingsley, § 1145); or if additional security be given it is valid (20 *Johns.* 76); or if a note of a third person be given it is binding (1 *Wend.* 164); or if the compromise be of unliquidated damages it is effective (1 *Denio*, 257). A satisfaction by one of several wrong-doers jointly and severally liable, is, even though only partial, a satisfaction *pro tanto* as to all (37 *Barb.* 817). As to distinction between part payment of admitted and of disputed debt, see 67 *Barb.* 393; 8 *Hun.* 584; 1 *Thomps. & C.* 5. Part payment of a disputed debt is a good accord and satisfaction (96 *N. Y.* 640). When the receipt of part in full of a disputed claim will bar an action for the residue, the protest of the party receiving it is ineffectual (24 *Hun.* 78). The acceptance of the notes of a third person, under a parol agreement that they shall be taken in payment of rent due and to become due under an indenture of lease, under seal, constitutes an accord and satisfaction, not only of the past but of the future breach of the covenant to pay (9 *Daly*, 140).

City Court.

Special Term—April, 1887.

JAMES EVERARD *against* MICHAEL BRENNAN.

A member of assembly cannot be arrested on civil process during his attendance at the session of the house to which he belongs. The privilege extends during any adjournment until its next meeting, not exceeding fourteen days; also for fourteen days prior to and after the close of the session. The privilege is founded on public policy.

As the court is powerless to enforce obedience to orders in supplementary proceedings while this privilege exists, such orders should not

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be made during this period, and if made, ought to be vacated as improvidently granted.

An order in supplementary proceedings was served upon the defendant, at the Grand Central Depot, while getting on the train for the State capitol, to attend to his official duties as a member of assembly from the Fifth District of this city. The defendant has failed to appear, or in plainer language has disobeyed the order. Counsel has appeared for him and urged the impropriety of the service.

McADAM, Ch. J.—The court is powerless to enforce obedience to its order, which proves that it should never have been made. The issuing of such orders tends to bring the courts into contempt, hence the practice is unwarranted. The only method of enforcing obedience is by attachment, and a member of the assembly cannot be arrested on civil process during his attendance at the session of the house to which he belongs (1 R. S. 6 ed. 504, § 6), also while going to or returning from such session (*Id.*, § 7). The privilege extends after any adjournment of the legislature until its next meeting, when such adjournment shall not exceed fourteen days (*Id.*, § 8).

The defendant committed no contempt of court in neglecting to obey its order. He owed a higher duty to the State, and its performance could not be enjoined or prevented either by direct or indirect methods. The exemption is founded on grounds of public policy, and is not allowed out of any personal consideration for the officer. The privileges of the members are of so great importance that no man is allowed to plead ignorance of the persons of those who are entitled to them (*Cushing's Law of Leg. Assemblies*, § 554).

Exemption from legal process is one of the most important privileges of members of a legislative assembly (*Id.*, § 549). They are exempt from arrest on civil process (*Id.*, 558). The privilege of exemption from legal process

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being intended to enable the members to give their attendance at the time and place appointed for their sitting, and to remain together for the purpose of performing their duties as members ; it is manifest, that to be commensurate with the purpose for which it was intended, the privilege must commence a sufficient time previous to the session to enable the members to attend in season, and must continue all the time of the sitting of the assembly, and, for the same reason which prevails in other cases of privilege, it ought also to continue for such a time after the termination of the sitting, as to enable the members to return to their homes (*Id.* § 579).

The Legislature has fixed this time at fourteen days prior to the session, and fourteen days after its close (1 *R. S.* 6 ed. 504, § 7). The privilege of legislative bodies is as old as the common law and older than Magna Charta (*Potter's Dicarris Stat.* 573).

Under these circumstances, the order was improvidently issued, and must be vacated, but without costs.

Marine Court.

Chambers—April, 1881.

MARK OTTINGER, ET AL., against EVE PRINCE.

Summary Proceedings. A grantee of lands may as such maintain summary proceedings to recover possession of the premises for non-payment of the rent due subsequent to the grant, and may in the same proceeding include a demand for prior rent assigned to the grantee by the grantor.

Motion to dismiss proceedings.

McADAM, J.—The owner of realty may, by a grant of the land, and assignment of rent due, confer upon his
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grantee all the rights and remedies in respect to the land which he would have had if the grant and assignment had not been made. When these rights unite in one and the same person, he is put in the place of the grantor.

The grantee in such a case could recover all in a single action, and why not in a summary proceeding? The right of action and of possession are in the present landlords, and it would defeat the purpose of the law to deny them any of the remedies furnished for their enforcement and protection. The petition states all the facts, and sufficiently confers jurisdiction (see 2 *R. S.* 6 ed. 1128, § 20). Motion to dismiss denied.

See Code, § 2235; *McAdam Landl. & T.* 2 ed. 388 *et seq.*; and *People v. Stuyvesant*, 1 *Hun*, 102.

City Court.

Trial Term—March, 1884.

HERMAN KNUBEL *against* FLINTOLITHIC STONE
AND MARBLE CO.

Denial of all knowledge or recollection by a party who, in the nature of things, ought to know whether a fact alleged be so or not, creates a question of fact, as much so as a positive denial of the fact.

Motion for new trial on the minutes.

Arnour, Ritch & Woolford, for motion.

Warren & Ethridge, opposed.

MCADAM, Ch. J.—The main objection urged against the verdict is, that it is excessive, because the jury, it is said, disregarded the evidence produced by the defendant to

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sustain the defense, that the "commission should not be payable until the defendant had received payment for the work done on the contracts procured." There is evidence on the part of the defendant showing that such a notice was given; but one McKnight, one of the defendant's witnesses, swears that the notice was not given until after all the contracts had been procured. Such a notice cannot divest the plaintiff of his right to the commissions actually earned at the time, and would affect only future transactions. The defendant claims, and proves by other witnesses, that McKnight may have been mistaken in regard to the time when this notice was given. But the difficulty is, that the evidence of McKnight is in the case, and went to the jury, and, taken in connection with the plaintiff's evidence, in which he states that he knew nothing about any such rule, *and did not remember any conversation at which such notice was given*, created a question of fact upon which the jury were required to pass.

The evidence may not be strong, but it is sufficient to sustain the finding of the jury. Denial of all knowledge or recollection by a party who, in the nature of things, ought to know whether a fact alleged be so or not, must be held to create a question of fact, otherwise the evidence of a conscientious witness might be disregarded, and considered as of no value, because he declines to be as emphatic in his statements of what occurred as the other witnesses to the transaction. Upon the entire case, the motion for a new trial must be denied.

Affirmed at the general terms of the city court, and of the common pleas.

Witness may testify to impressions or belief.

It is competent for a witness to testify to an impression or belief on the subject (Blake v. People, 73 N. Y. 586; Carr v. Breese, 81 Id. 584).

Mere impressions of a witness, unaccompanied by any circumstances, are of no avail in opposition to positive testimony. Under

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a plea of the statute of limitations, the assignor of plaintiff swore positively that a part payment had been made, but stated that he could not say positively it was made within six years, although he believed it was. The defendant swore positively that he had made no payment within six years. *Held*, that a finding of the justice in favor of the plaintiff was clearly against evidence; that this was not a case of conflict of testimony, but of imperfect recollection on one side and positive recollection on the other (*Dresser v. Van Pelt*, 1 *Hil.* 316).

City Court.

General Term—March, 1886.

**PATRICK QUINLAN, PLAINTIFF AND APPELLANT, against
ST. FRANCIS XAVIER MUTUAL BENEFIT
SOCIETY, DEFENDANT AND RESPONDENT.**

An agreement by a member of a benevolent society to refer all differences to arbitration, will not oust the courts of their jurisdiction.

Appeal from judgment entered on dismissal of complaint.

F. Solinger, for appellant.

Jeroloman & Arrowsmith, for respondent.

BY THE COURT.—MCADAM, Ch. J., HYATT and BROWNE, JJ.—The complaint was dismissed on the sole ground that by the 11th section of the defendant's by-laws the plaintiff was bound to submit the question of the defendant's liability to the "Reverend Director," for his decision; and by that law he is made the sole and only judge of that question.

The provision in question is a very proper one, particularly in a society attached to a church; and if the plaintiff had submitted to the jurisdiction of the Rever-

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end Director, his decision would have been conclusive. But the plaintiff did not appear before the Reverend Director, and appealed to this court for redress. The court of appeals have laid down the rule that, "An agreement to refer all matters of difference or dispute that may arise to arbitration, will not oust the courts of their jurisdiction" (Pres't, &c. of Delaware & Hudson Canal Co. v. Pennsylvania Coal Co., 50 N. Y. 258).

We are bound to follow this instruction from the highest court in the State, and, under this decision, must reverse the judgment, and order a new trial (See, also, cases of *Heath v. New York Gold Exchange*, 38 *How. Pr.* 170; *Scott v. Avery*, 5 *H. of L. Cases*, 846).

A party not willing to Arbitrate, cannot be deprived of his legal Remedy.

Remedies are to be according to the course of the common law, and retroactive legislation requiring a cause of action to be submitted to a tribunal not proceeding according to the course of the common law, is unconstitutional (*In re Townsend*, 39 N. Y. 171). A stipulation in a written contract for building, that, in case any question arises under such contract in relation to the work, both as to value of work added or deducted, the same shall be adjusted by the architect, is not binding—being against the policy of the common law, and having a tendency to exclude the jurisdiction of the courts provided with ample means to entertain and decide legal controversies (*Hurst v. Litchfield*, 39 N. Y. 377; but see cases cited below).

Condition that Work shall be satisfactory to Architect, or third person.

Where a party contracts to do work, and that the whole shall be completed to the satisfaction of a third party, in an action to recover the stipulated price, he must aver and prove the work was done to the entire satisfaction of such third person (*Barton v. Hermann*, 11 *Abb. Pr. N. S.* 378; *Butler v. Tucker*, 24 *Wend.* 447; *Morgan v. Birnie*, 9 *Bing.* 672; *Milner v. Field*, 5 *Exch.* 829; *Clark v. Watson*, 18 *C. B. N. S.* 278; *Smith v. Briggs*, 3 *Den.* 73; *Martin v. Leggett*, 4 *E. D. Smith*, 255; *Smith v. Brady*, 17 N. Y. 173; *Stewart v. Keteltas*, 36 *Id.* 388; *Wyckoff v. Meyers*, 44 *Id.* 145; *Schencke v. Rowell*,

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3 *Abb. N. C.* 42; *Oakley v. Morton*, 11 *N. Y.* 33; *Wangler v. Swift*, 90 *Id.* 38).

What excuses Certificate.

Fraud or collusion with the architect, or some legal excuse, will excuse the production of the certificate of the architect or third person (*Battersbury v. Vyse*, 2 *Hurls. & C.* 42; *Martin v. Leggett*, 4 *E. D. Smith*, 255; *Thomas v. Fleury*, 26 *N. Y.* 26; *Barton v. Hermann*, 11 *Abb. Pr. N. S.* 378; *Schencke v. Rowell*, 3 *Abb. N. Cas.* 47). So, also, where he, unconscientiously and in bad faith, withholds it (*Thomas v. Fleury*, 26 *N. Y.* 26; *Bowery Nat. Bank v. Mayor*, 63 *Id.* 336; *Jones v. Judd*, 4 *Id.* 411. See, also, 6 *Moak's Eng. R.* 528, 871; and 2 *Hurls. & C.* 42).

What Agreements to submit are legal.

An agreement that before any right of action accrues, "certain facts shall be determined, or the amounts or values ascertained," is valid, and no cause of action arises until the award is made (*President, &c. v. Penn. Coal Co.*, 50 *N. Y.* 250; *Gay v. Lathrop*, 6 *St. Rep.* 603); but an agreement to refer, which ousts the courts of their ordinary jurisdiction, is void (*Ib.*).

Satisfactory.

When work is to be done to the satisfaction of another, the question is, not whether he ought to be satisfied, but was he satisfied? (*Gray v. New York Central R. R. Co.*, 11 *Hun.* 70; *Tyler v. Ames*, 6 *Lans.* 280; *Spring v. Ansonia Clock Co.*, 24 *Hun.* 175; *McCarren v. McNulty*, 7 *Gray*, 139; *Brown v. Foster*, 113 *Mass.* 136; *Smith v. Wright*, 4 *Hun.* 652; *Aiken v. Hyde*, 99 *Mass.* 183; *Goodrich v. Norwich*, 43 *Ill.* 356; *Hunt v. Wyman*, 100 *Mass.* 198; *Heron v. Davis*, 3 *Bosw.* 336). This rule still exists in reference to portraits and works of taste, and as to theatrical plays (*Glenny v. Lacy*, 16 *St. Rep.* 798); but has been otherwise modified by holding that under such a contract, "that which the law will say a contracting party ought in reason to be satisfied with, that it will say he is satisfied with" (*Duplex Safety Boiler Co. v. Garden*, 101 *N. Y.* 387).

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City Court.*Special Term—May, 1887.***ROURKE *against* THE DOMESTIC SEWING
MACHINE CO.**

An application for leave to discontinue is in the nature of a petition to the court for relief, and does not violate an order staying plaintiff's proceedings.

MCADAM, Ch. J.—The defendant obtained an order requiring the plaintiff to file security for costs, with a stay of all his proceedings in the mean time. The plaintiff now moves for leave to discontinue. The stay does not prevent this. The application is not aggressive, but in the nature of a petition to the court for relief. The plaintiff cannot comply with its order, and asks leave to retire from the litigation. He should be permitted to do this on payment of the taxable costs (1 *Abb. Pr.* 46).

Application for leave to discontinue, on payment of costs, granted.

City Court.*General Term—October, 1886.***JOHN J. SCHMITT, RESPONDENT, *against* THE DRY
DOCK, EAST BROADWAY AND BATTERY
RAILROAD COMPANY, APPELLANT.**

Negligence must be determined by what was known before and at the time of the accident, and not by subsequent facts; in other words, it must be decided upon the facts as they existed at the time of the injury. Special damages must be alleged as well as proved.

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Appeal from judgment entered on verdict of the jury in favor of the plaintiff.

J. M. Scribner, for appellant.

*Charles Miehl*ing, for respondent.

MCADAM, Ch. J.—The action was brought to recover damages for injuries received while the plaintiff was on one of the defendant's cars, as the result, it is charged of the defendant's negligence. The case was tried on conflicting evidence, and we are not disposed to disturb the verdict, which is moderate in amount, unless some error was committed on the trial to the defendant's prejudice, which necessitates a new trial. The plaintiff claims in his complaint that in consequence of the injuries his clothing was "saturated with blood." This is the only allegation of special damage to clothing, and yet upon the trial the plaintiff was permitted (under objection and exception) to testify that his clothing was "cut" so that he could not wear it, and that it was worth \$25, or, in his own language, "he would not have taken \$25 for it." This was error. Damages which are not the immediate and natural consequences of an unlawful act, or which the law will presume necessarily to flow from it, must be specially stated in the complaint, or the plaintiff will not be allowed to go into evidence to prove such items of damage (*Moloney v. Dows*, 15 *How. Pr.* 265; 2 *Sedgw. Dam.* 7 ed. 608, note). The "cutting" of clothing cannot be proved under an allegation that it was "saturated," nor was the method of proving the damage competent.

(2.) The plaintiff was also allowed to prove (under objection and exception) that his doctor sent him a bill for \$50. There was no proof that the bill had been paid, or that the services were worth the amount charged. The bill was thereafter received in evidence under objection

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and exception. This was error. The plaintiff could only recover so much as he had paid or was actually bound to pay the doctor for his services (*Drinkwater v. Dinsmore*, 80 *N. Y.* 393). The plaintiff paid nothing, and the bill was not *per se* evidence of what he was legally bound to pay. Damages, to be recoverable, must be proved according to legal principles.

(3.) There was evidence offered by the plaintiff tending to show that the day after the accident the defendant discharged the driver of the car on which the accident happened. The testimony was admitted under exception. This was error. Evidence tending to prove that alterations have been made or precautions taken after an accident, which, if previously done, might have obviated it, is incompetent (*Dougan v. Champlain Trans. Co.*, 56 *N. Y.* 8; *Dale v. D., L. & W. R. R. Co.*, 73 *Id.* 468; *Payne v. Troy & Boston R. R. Co.*, 9 *Hun*, 526). Negligence is to be determined by what was known before and at the time of the accident, and not by subsequent facts. In other words, the question whether a defendant is guilty of negligence must be decided upon the facts as they existed at the time of the injury.

The circumstance that the defendant discharged the driver after the accident for prudential or other reasons does not militate against the defendant, as his discharge had no more tendency to prove negligence on the day of the accident than his continued employment by the defendant would have disproved negligence. The reasons which influenced the driver's discharge were not within the issue on the trial, and, however satisfactory to the defendant, were immaterial and incompetent as evidence either for or against the defendant. The testimony improperly admitted may have influenced the jury, and whether it did or not the inference is that it had an effect prejudicial to the defendant (*Green v. White*, 37 *N. Y.* 405; *Stokes v. People*, 53 *Id.* 180, and kindred cases). For these reasons, the judgment must be reversed and a

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new trial granted, with costs to the appellant to abide the event.

NEHRBAS, J., concurred.

Appellant Presumably Injured by Error.

If error is shown, and, in any aspect it may possibly have, it injured the defendant, he is not required to show how, or to what extent he was prejudiced. The existence of the error establishes his claim to relief. To warrant sustaining an erroneous decision on the ground that the error was harmless, the respondent must show that the error did not, and could have affected the appellant's rights (*Greene v. White*, 87 *N. Y.* 405. To same effect, see *Union Bank v. Mott*, 39 *Barb.* 180). Where the appellant shows error, the presumption is that he has been prejudiced by it, and if the respondent claims the contrary, it is incumbent on him to see that the record discloses such fact (*Morrison v. Judge*, 14 *Ala.* 182; *Exp. Keenan*, 21 *Ala.* 558; *Thomas v. De Graffenreid*, 27 *Ala.* 651; *Buford v. Gould*, 35 *Ala.* 265; *Jackson v. Feather River Co.*, 14 *Cal.* 18; *Norwood v. Renfield*, 30 *Cal.* 393). Where there is error in the charge of a judge, which is excepted to, there must be *venire de novo*, unless the respondent can show conclusively, from the record, that the error can not in any wise have affected the verdict (*State v. Patten*, 13 *Ired. L.* 421; *Wiley v. Givens*, 6 *Gratt.* 277). The supreme court of the United States, in *Vicksburgh R. R. Co. v. O'Brien* (22 *Reporter*, 770), said: "While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party" (citing *Smiths v. Shoemaker*, 17 *Wall.* 630, 639; *Deery v. Cray*, 5 *Id.* 795; *Moore v. Nat. Bk.*, 104 *U. S.* 625; *Gilmer v. Higley*, 110 *Id.* 50. See cases upon the subject collated in *Baylies New Trials*, 177).

Admissions of Agent, when Competent.

The admission or declaration of an agent binds the principal only when it is made during the continuance of the agency in regard to a transaction then depending *et dum fervet opus*. It is because it is a verbal act and part of the *res geste* that it is admissible at all; and, therefore, it is not necessary to call the agent to prove it but wherever what he did is admissible in evidence, there it is competent

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to prove what he said about the act while he was doing it (1 *Greenl. Ev.* § 113). The court had occasion, in *Packet Co. v. Clough*, 20 *Wall*, 528, to consider this question, referring to the rule, as stated by Mr. Justice STORY, in his *Treatise on Agency*, § 134, that "where the acts of the agent will bind the principal, there his representations, declarations and admissions respecting the subject matter will also bind him, if made at the same time and constituting part of the *res gestæ*." The court said: "A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period. The reason is, that the agent to do the act is not authorized to narrate what he had done, or how he had done it, and his declaration is no part of the *res gestæ*." Following this line of argument, the supreme court of the United States (in *Vicksburgh R. R. Co. v. O'Brien*, 22 *Reporter*, 771), said: "We are of opinion that the declaration of the engineer Herbert to the witness Roach was not competent against the defendant for the purpose of proving the rate of speed at which the train was moving at the time of the accident. It is true that, in view of the engineer's experience and position, his statements under oath as a witness in respect to that matter, if credited, would have influence with the jury. Although the speed of the train was, in some degree, subject to his control, still his authority in that respect did not carry with it authority to make declarations or admissions at a subsequent time, as to the manner in which on any particular trip, or at any designated point in his route, he had performed his duty. His declaration, after he accident had become a completed fact, and when he was not performing the duties of engineer, that the train, at the moment the plaintiff was injured, was being run at the rate of eighteen miles an hour, was not explanatory of anything in which he was then engaged. It did not accompany the act from which the injuries in question arose. It was, in its essence, the mere narration of a past occurrence not a part of the *res gestæ*—simply an assertion or representation, in the course of conversation, as to a matter not then pending, and in respect to which his authority as engineer had been fully exerted. It is not to be deemed part of the *res gestæ*, simply because of the brief period intervening between the accident and the making of the declaration. The fact remains that the occurrences had ended when the declaration in question was made, and the engineer was not in the act of doing anything that could possibly affect it. If his declaration had been made the next day after the accident, it would scarcely

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be claimed that it was admissible evidence against the company. And yet the circumstance that it was made between ten and thirty minutes—an appreciable period of time—after the accident, cannot upon principle, make this case an exception to the general rule. If the contrary view should be maintained, it would follow that the declaration of the engineer, if favorable to the company, would have been admissible on its behalf as part of the *res gestæ*, without calling him as a witness—a proposition that will find no support in the law of evidence. The cases have gone far enough in the admission of the subsequent declarations of agents as evidence against their principals. These views are fully sustained by adjudications in the highest courts of the State." Citing *Luby v. Hudson R. R., Co.*, 17 *N. Y.* 131; *Penn. R. R. Co.*, 57 *Penn. St.* 343; *Dietrick v. B. & H. R. R. Co.*, 58 *Mil.* 347, 355; *Lane v. Bryant*, 9 *Gray*, 245; *C. B. & Q. R. R. Co. v. Riddle*, 60 *Ill.* 535; *V. & T. R. R. Co. v. Sayers*, 26 *Gratt.* 351; *C. & N. W. R. R. Co. v. Fillmore*, 57 *Ill.* 266; *Mich. C. R. R. Co. v. Coleman*, 28 *Mich.* 446; *Mobile & W. R. R. Co. v. Aschcraft*, 48 *Ala.* 30; *B. R. W. Co. v. Hunter*, 33 *Ind.* 354; *Adams v. H. & S. J. R. R. Co.*, 74 *Mo.* 556; *K. & P. R. Co. v. Pointer*, 9 *Kaus.* 630; *Roberts v. Banks*, *Litt. Sel. Cases*, 411; *Hawker v. B. & O. R. R. Co.*, 15 *W. V.* 636. See also *Taylor Ex.* 7 Eng. ed. § 602. The declaration of the driver, after the accident had occurred and the car had been stopped, but before he had left it, that he could not stop the car because the brakes were out of order, is mere hearsay, and not admissible in evidence against his employer (*Luby v. Hudson River R. R. Co.*, 17 *N. Y.* 131. To same effect, 51 *N. Y.* 295; 56 *Id.* 334; 72 *Id.* 542; 19 *Week. Dig.* 44). Declarations of an agent, to be evidence, must be made during the agency, and at the very time of the transaction they relate to, so as to constitute part of the *res gestæ* (*Dean v. Aetna Ins. Co.*, 62 *N. Y.* 642).

Declarations of Officers of Corporation.

The declarations of agents or officers of a corporation are only admissible when made as part of the *res gestæ*, or in performance of the duties of their agency (*First Nat. Bk. v. Ocean Nat. Bk.*, 60 *N. Y.* 278). In an action against a corporation for the acts of its servant, admissions by the president, made after the act, of the knowledge by the officers of the servant's character, are not admissible against the corporation (*Utter v. Forty-second St. R. R. Co.*, 6 *Daly*, 227).

A somewhat similar question arose in *New Jersey Steamboat Co. v. Brockett* (U. S. Supreme Court, 1887), an action against the company for the forcible ejection of the defendant in error from their cars.

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The plaintiff in his evidence described the manner in which, as was contended, he was dragged by the watchman from the boxes. After stating that he was thrown to the floor, and was being roughly pushed by the watchman, he proceeded: "Then I saw another man coming with the uniform of the boat on, and the cap, and he said: 'All such men as you ought to be killed.' I says, 'What do you want to kill me for?' He says, 'You farmers are so stingy, you are too stingy to buy a state-room, and you ought to be killed.' I said, 'You ought not to call me stingy.' Then he said, 'Have you looked at your ticket?' I think he had 'third assistant mate' on his cap, the cap had a yellow cord, the same as the officers of the boat wore." It appeared, in proof, that the person here referred to was one of the mates of the Richmond.

The defendant objected, at the trial, to the competency of the statements of the mate. The objection was overruled and an exception taken. It was insisted on error that the defendant was not responsible for the brutal language of its servants, and that the declarations of the mate to the plaintiff were not competent as evidence against the carrier.

The supreme court overrule this objection. They say: "We are of opinion that these declarations constituted a part of the *res geste*. They were made by one servant of the defendant while assisting another servant in enforcing its regulation as to deck passengers. They were made when the watchman and the mate, according to the evidence of the plaintiff, were both in the very act of violently "pushing" him, while in a helpless condition, to that part of the boat assigned to deck passengers. Plainly, therefore, they had some relation to the inquiry, whether the enforcement of that regulation was attended with unnecessary or cruel severity. They accompanied and explained the acts of the defendant's servants out of which directly arose the injuries inflicted upon the plaintiff" (*Vicksburg & Meridian R. R. Co. v. O'Brien*, 119 *U. S.* 99, 105; *O. & M. R. R. Co. v. Porter*, 92 *Ill.* 437, 439; *Toledo & Wabash R. W. Co.*, 25 *Ind.* 190, 191).

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City Court.

*Trial Term—November, 1886.*JOHN MOONEY *against* THIRD AVENUE RAIL-
ROAD CO.

Joint and Several Acts of Negligence—Proximate and Remote Causes. Persons who co-operate in an act directly causing injury are jointly liable for its consequences, if they acted in concert in causing a single injury. But persons who act separately, each causing a separate injury, cannot be made liable, even though the injuries thus committed are all inflicted at one time, and precisely similar in character.

Where separate injuries are so committed, the proximate cause of both is liable for all the damages.

The measure of damages in an action by a husband for injuries to his wife are limited to loss of services and expenses which he personally incurs.

See note at end of case as to joint wrong-doers.

Trial before the court and a jury.

W. L. Bruen, for plaintiff.

Lauterbach & Spingarn, for defendant.

The facts appear in the charge to the jury, delivered by McADAM, Ch. J., who said :

GENTLEMEN : This is an action brought by John Mooney to recover damages for the services of his wife, which he claims to have lost in consequence of injuries received by her on the evening of May 5, 1885. The case is peculiar, and in some of its aspects remarkable, as showing the accidents to which pedestrians are exposed in great cities, and how from one misfortune others may follow in rapid

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succession, before the unfortunate victim has had an opportunity of recovering sufficiently from the first to appreciate and avoid the dangers of the second.

On the evening in question the plaintiff's wife was crossing Third Avenue, near Thirty-sixth Street, traveling from the west to the east. In crossing, and while a little east of the tracks of the Third Avenue Railroad, she was knocked down by a cab belonging to Ryerson & Brown, and thrown upon the tracks of the railroad company, and while lying there was injured by the horses before one of the cars of the Third Avenue Railroad Company. Each of these acts was done by independent parties, neither acting in concert with the other. For such acts there is a remedy, of course; but the nature of it depends upon circumstances, in reference to which you are entitled to instructions, as clear as the nature of the complication will admit, and my understanding of the law will afford.

We have in law what are termed proximate and remote causes, and the policy of courts has been to hold the party who originates a wrong to all the consequences flowing from it. This rule is exemplified in the celebrated case of *Scott v. Shepherd* (3 *Wils.* 403; 2 *W. Bl.* 892), where the facts were that the defendant threw a lighted squib into a crowd of people, one after another of whom in self-protection threw it from him until it exploded near the plaintiff's eye, and blinded him. Here was but a single wrong—the original act of throwing the dangerous missile; and, though the plaintiff would not have been harmed by it but for the subsequent acts of others throwing it in his direction, yet as these were instinctive and innocent, it is the same as if a cracker had been flung, which had bounded and rebounded, again and again, before it struck the plaintiff's eye, and the injury was therefore held to be a natural and proximate result of the original act, and, the circumstance conjoined with it to produce the injury being perfectly natural, these circumstances might have

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been anticipated. In the present case, the plaintiff would have had no right to throw herself down upon the tracks of the car company, and could not have recovered if she had done so voluntarily. She was thrown down, however, by the cab of Ryerson & Brown, so that her presence there was not unlawful, and the Third Avenue Company is liable in this action, if the driver of their car saw the plaintiff's wife in her perilous position, and could by the exercise of proper care have avoided running over or injuring her, and doing the damage which the horses attached to the car added to those injuries which she had previously received from the cab. To make myself better understood, I charge you that the presence of the plaintiff upon the track of the railroad company, under the circumstances stated, gave the driver of the car no legal license to run over the plaintiff's wife. On the contrary, the driver was bound to exercise reasonable care to avoid doing her any further injury.

In determining whether the driver was negligent or not, you must not overlook the fact that if the cab had not interfered with the plaintiff's wife, she would probably have passed on her way in safety, unharmed by the car. Mrs. Mooney evidently did not anticipate that the cab was going to knock her down, any more than the driver of the car was bound to anticipate it. She probably thought her position was safe enough, or she presumably would not have taken it. The car-driver is entitled to the benefit of the same presumption,—that is, that Mrs. Mooney considered herself safe where she was. In other words, the car-driver was no more bound to assume that Mrs. Mooney was in danger before the cab struck her and threw her down than Mrs. Mooney herself. The driver's conduct must be judged of in the light of the circumstances as they transpired. He was not bound to have a presentiment in advance that Mrs. Mooney was to be knocked down by the cab, unless he had an opportunity of seeing that such a result was inevitable, in which case,

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he was bound to govern himself accordingly. If the driver of the car, when he observed the peril of Mrs. Mooney, acted as a prudent driver would have done under the circumstances, and in the position he was placed, he was not guilty of negligence.

The converse is also true. If the car-driver failed to exercise the care, or use the efforts which a prudent driver would have exercised under the circumstances, and in the position he was placed, the driver was guilty of negligence, and if that negligence resulted in injury to Mrs. Mooney, which has occasioned loss of services to her husband, the railroad company is liable for the loss it caused.

If you find that the car-driver was not guilty of negligence, you may find for the defendant without considering the question of damages, for that task becomes unnecessary. If you find that the injuries the plaintiff's wife received were the result of her own imprudence and want of care, the plaintiff cannot recover. If her negligence contributed in any way to the injury, the plaintiff cannot recover. But if she was entirely free from fault the plaintiff has a remedy against the person or persons who inflicted the injury for which he seeks compensation. If the defendant's driver was free from fault, it will be your duty to find a verdict in favor of the defendant, leaving the plaintiff to pursue any remedy he may have against Ryerson & Brown, the owners of the cab which inflicted the first damage.

If you find, however, that the car-driver was guilty of negligence, and that the plaintiff's wife was free from fault, you will next assess the damages which the husband sustained in the loss of her services, present and prospective—you are not to allow for the personal injury Mrs. Mooney received, nor for the pain and suffering she endured, for she has another action for that in her own right in which such damages may be recovered.

This action is by the husband, and his damages are by
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law confined exclusively to loss of services and expenses which he personally incurred.

You are not to allow for any damages Ryerson & Brown's cab did her, because they are not before the court, and the plaintiff may bring an independent action against them if he elects to do so. If they were before the court, and were found to be the proximate cause of the injury, the entire damages might have been collected from them, but their share of the liability must be determined when they are before the court, and after they have been heard in their defense. How you are to apportion these damages must in the nature of things be left largely to you, and to the exercise of your intelligence and good judgment. This instruction will be limited, however, by a reference to two adjudged cases which I charge you state the law correctly. The first is *Marble v. Worcester* (4 *Gray*, 395), in which it was substantially held, "It is certainly true that where two or more independent causes concur in producing an effect, and it cannot be determined which was the efficient and controlling cause, or whether, without the concurrence of both, the event would have happened at all, and a particular party is responsible for only the consequences of one of such causes, in such case a recovery cannot be had, because it cannot be judicially determined that the damage would have done without such concurrence." The next is *Davis v. Garrett* (6 *Bing.* 716), and is perhaps more applicable to Ryerson & Brown than to the defendants. It lays down this rule: "But it is equally true that no wrong-doer ought to be allowed to apportion or qualify his own wrong; and that, as a loss has actually happened whilst his own wrongful act was in force and operation, he ought not to be permitted to set up as a defense that there was a more immediate cause of the loss, if that cause was put in operation by his own wrongful act. To entitle such party to exemption he must show not only that the same loss might have

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happened, but "that it must have happened, if the act complained of had not been done."

If, therefore, you find that Ryerson & Brown were the proximate cause of the injury, and you cannot apportion the damages done by the Car Co., you must find for the defendant, leaving the plaintiff to his remedy over against Ryerson & Brown the original wrong-doers, through whose negligence the various injuries are imputable as necessary sequences of their original wrong in knocking Mrs. Mooney down, and leaving her prostrate upon the railroad track, unprotected and uncared for.

Gentlemen, consider this case carefully and conscientiously. Do fair, even and exact justice according to law. Do not allow sympathy to swerve you, nor prejudice to influence your judgment. Do not deny justice because the plaintiff is poor or the defendant rich. Higher motives must influence you in the discharge of your sacred sworn duty to litigants when they enter the portals of a court of justice.

Let your verdict follow the evidence and the law, and let it record the honest, conscientious convictions of your soul, that these litigants may feel that the result, however unfortunate to either of them in a financial point of view, emanated from an honest determination to be true to your oaths as American jurymen.

The jury found for the defendants. No appeal was taken.

Whether the Liability is Joint or Several.

Persons who co-operate in an act directly causing injury, are jointly liable for its consequences, if they acted in concert, or united in causing a single injury. Thus the proprietors of two vehicles, both of which are driven so carelessly as to injure a third person by their collision, are jointly liable for the damage done, although in no way connected in business together (*Sherman & Redf. Neg.* § 58). But persons who act separately, each causing a separate injury, cannot be made liable, even though the injuries thus committed are all inflicted at one time, and precisely similar in character (*Ib.*).

Where the owner of a lot fronting on a street with other persons

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caused to be made an excavation in and under the sidewalk in front of the lot, and the plaintiff, having fallen into the excavation, was injured,—*Held*, that although the person making the excavation, and the city (under its charter), may be each liable to the plaintiff for the injury, yet they are not *jointly* liable; that their improper joinder in such action is a ground of demurrer on the part of either (*Trowbridge v. Forepaugh*, 14 *Minn.* 133).

Where two or more persons are operating a railroad, their liability to an employe for breach of their duty to furnish safe machinery for his use, is several as well as joint (*Kain v. Smith*, 80 *N. Y.* 458). Where the independent torts of two persons in neglecting to provide water-escapes caused an accumulation of water which flooded plaintiff's store,—*Held*, that either wrong-doer was liable for the whole damage, although both contributed thereto, since it was impossible to distinguish or separate the different shares of each in the injury to the plaintiff (citing 6 *Duer*, 332; 20 *N. Y.* 49). It is no defense for a person against whom negligence which caused damage is proved, to prove that without fault on his part the same damage would have resulted from the act of another (citing 38 *N. Y.* 260; *Slater v. Mersereau*, 64 *N. Y.* 138; affirming 5 *Duly*, 445).

Where a statute imposes on two municipalities the duty of erecting and maintaining a bridge over a boundary stream, each is liable for omission to properly guard both approaches to the bridge when it is undergoing repairs at the hands of a contractor with both, which renders it impassable, and one of such municipalities may be held liable for damages sustained upon the territory of the other for a failure to erect a proper barrier across the road forming the approach to that end of such bridge (*Haxhurst v. Mayor, &c.*, 43 *Hun*, 588).

Unless the negligence of two defendants is joint or concurrent, each is liable for his own negligence only, although engaged in a common purpose.

Municipal corporations are generally not liable for the neglect of their officers, unless the law has imposed a duty on the corporation in the premises.

A public official is not liable for the negligence of his inferior, if the latter is also a public officer and not a private servant.

The like rule of exemption from liability for negligence of inferiors, may obtain, as to public agents, and public charitable institutions having no fund appropriated to the payment of such damages.

But in this case the court is unable to say, from the charter alone, or the other evidence in the case, that the Insurance Patrol of the City of Philadelphia belongs to either of the two latter classes; and,

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therefore, held to be error in the court below to nonsuit the plaintiff (Boyd v. Insurance Patrol of Philadelphia; S. O., Pa. Pitts. L. J. November 10, 1886.)

Negligence — Proximate and Remote Cause — Intervening Agency.

The following report of the case of South Side Passenger Railway Co. v. Trich (20 *Weekly Notes Pa.* 324) is instructive.

Error to the Common Pleas No. 2, of Allegheny County.

Case, by Edward M. Trich and Sarah W., his wife, in right of said wife, against the South Side Passenger Railway Company, to recover damages for an injury to Mrs. Trich, alleged to have been caused by the negligence of the company defendant.

On the trial, before before EWING, P. J., the following facts appeared: On April 5, 1882, Mrs. Trich hailed a bob-tailed car of the Third Avenueline, belonging to the company defendant, at the intersection of Third Avenue and Smithfield Street in Pittsburg. The conductor stopped the car and Mrs. Trich got upon the car-step. While still there, and before she could get into the car, the driver saw a runaway horse and buggy coming up Smithfield Street, and, in order to avoid them, whipped up his horses and started the car rapidly. Mrs. Trich was thrown off by the bouncing of the car, alighting on her feet, and at the same moment was struck by the runaway and injured. There was no dispute as to the fact that the sole injury was caused by contact with the runaway vehicle.

The defendant requested the court to charge, *inter alia*, as follows: —

“It being the undisputed evidence in the case that Mrs. Trich was not injured by falling off the defendant's car, but by being struck by a runaway horse, even if the driver of the car was guilty of negligence, such negligence was not the proximate cause of the injury, and the plaintiff cannot recover.” *Answer.* Refused. “It is a question for the jury under the evidence and under the further instructions of the court.” (First assignment of error.)

The court charged the jury, *inter alia*, as follows: “Then comes in another question on which the defendant's counsel have asked us to instruct you. They have asked us to say to you that, it being undisputed evidence in the case that Mrs. Trich was not injured by falling off the defendant's car, but by being struck by a runaway horse, even if the driver of the car was guilty of negligence, such negligence was not the proximate cause of the injury, and the plaintiffs cannot recover. This is refused. It is a question for the jury under the evidence and under the further instructions of the court.

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We do not think that we can say precisely what the facts are in this case. On that point the rule of law is this: A party defendant is only liable for what are called the proximate results of his act; not for the remote consequences; not where some other independent matter intervenes that could not have been foreseen by the party guilty of the negligence. This matter has been discussed by counsel in your presence, and some illustrations given as to which I will venture to make some suggestions. The evidence seems to me to preponderate very largely in favor of the fact that the immediate force which caused the injury to this woman was the runaway horse. Whether it was the horse or the shafts struck her, nobody tells, and probably nobody knows. Now, assuming that the car stopped as the plaintiff says; that it started improperly, and that she was jolted off, where she says she was, by the negligent conduct of the driver—assuming all that to be true, if, before she could get away, a stone had been thrown from some building adjoining and struck her, when, if she had been on the corner or on the car, it would not have struck her, clearly the defendant company would not be liable. The proximate cause of the injury would be the stone falling on her; not her falling from the car. Her being there was a mere accidental thing, and the car company would not be responsible, because they would have no right to anticipate that the consequence of their neglect would be that Mrs. Trich would be struck by a stone from the adjoining building; it was not to be expected; it would be too remote; and she could not recover. I give you that as an illustration, and the practical question for you in this case is (if you find, as I have little doubt you will find, in discussing this question, that the injury came from the force with which she was struck by the runaway horse) was the striking of a woman thrown off in this way, a result that they would have a right or ought to anticipate would be the result of negligence in throwing her off the car at that place and point? I think the court should say that the driver was bound to take into consideration, at such a crossing, that vehicles would be passing and repassing, and that there is more or less danger of a person being struck by a vehicle before they could get out of the way, if thrown off in the middle of the street. But it is for the jury to say whether or not, under the circumstances in this case, if they find that the driver was guilty of negligence, it was a consequence to be fairly anticipated that she would be struck by a passing vehicle or a passing horse before she could get out of the way." (Second assignment of error.)

Verdict and judgment for plaintiffs. Defendant thereupon took

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this writ, assigning for error, *inter alia*, the refusal of their point as above, and the charge of the court above cited.

November 11, 1887. THE COURT.—There is no manner of question as to what was the actual and immediate cause of the injury inflicted upon Mrs. Trich. It was an entirely undisputed fact that she was struck and injured by a runaway horse and buggy. All the witnesses who saw the occurrence so testify. Thus Mr. McCully, the father of Mrs. Trich, who was present with her at the time, and was examined on her behalf, after describing her attempt to get on the car, and saying that she was bounced off, adds—"A moment or two afterwards, here comes a runaway horse and buggy down the street, and the shaft, I suppose it was, caught her under the arm and dragged her to the street-crossing and she fell away." The only other witness examined for the plaintiffs as to the facts of the occurrence, M. M. Herrington, testified—"There is a banking building there on the corner, and I saw the lady fall—fall off—and when she fell, to the best of my knowledge, she kind of threw herself back this way, and there was a phaeton or buggy of some kind running—a horse running down the street with a buggy—and it struck her, and they picked her up and carried her into Mr. Johnson's drug-store." There was no contradiction of this testimony. But one other witness, Mrs. Vraling, examined by the defendant, testified to the fact of the injury, and she also said it was done by the buggy striking the woman. The learned court below in the charge said: "The evidence seems to me to preponderate very largely in favor of the fact that the immediate force which caused the injury to this woman was the runaway horse."

This was an understatement of the testimony which might have led the jury to suppose that there was an open question, with a preponderance of evidence only, as to whether it was the runaway horse and buggy which inflicted the injury. The defendant had presented a point stating that it was the undisputed evidence that Mrs. Trich was injured by being struck by a runaway horse, so that the question was directly before the court. In view of that circumstance we think the court should have specifically so charged and not left it as an open question for the jury to determine with a mere expression of the opinion that the evidence preponderated in that direction.

Assuming then, as we do, that it was the undisputed evidence that the injury was inflicted by the runaway horse and buggy, the only remaining question is whether it was the duty of the court to declare whether this was the proximate cause of the injury. The point presented by the defendant asked for such an instruction, but the court refused it, saying it was a question for the jury under the

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evidence. In this we think there was error. In the case of *West Mahanoy v. Watson* (112 *Pa. St.* 574), we reversed the court below for making just such an answer to just such a point, and upon a review of the facts of the case we held that they did not constitute an instance of proximate cause as against the defendant, and therefore decided that the defendant's point should have been affirmed, which took the case from the jury. Mr. Justice PAXSON, in delivering the opinion, said: "While it is undoubtedly true as a general proposition that the question of proximate cause is for the jury, yet it has been repeatedly held that where there are no disputed facts the court may determine it. It is sufficient to refer to *Hoag v. Railroad Co.* (85 *Pa. St.* 293). In that case this court, following *Railroad v. Kerr* (62 *Pa. St.* 353) and *Railroad Co. v. Hope* (80 *Id.* 373), laid down the rule as to proximate cause as follows: "In determining what is proximate cause the true rule is that the injury must be the natural and probable consequence of the negligence: such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrong-doer, as likely to flow from his act."

Applying this rule to the facts of the present case, can it be said that the injury of Mrs. Trich was the actual and probable consequence of the car-driver's negligence in urging his horses to a faster gait? We think not. There was not a particle of evidence to show that runaway horses and vehicles were frequently, or indeed, ever seen upon Smithfield Street where this accident occurred. There was no evidence upon that subject. It was certainly not a natural consequence of a person being upon that street that he would be struck by a runaway horse. Nor is there the slightest reason for saying that it would be a probable consequence. The utmost that can be said would be that such a consequence might possibly happen. But things or results which are only possible cannot be spoken of as either probable or natural. For the latter are those things or events which are likely to happen, and which, for that reason, should be foreseen. Things which are possible may never happen, but those which are probable are those which do happen, and happen with such frequency or regularity as to become a matter of definite inference. To impose such a standard of care as requires, in the ordinary affairs of life, precaution on the part of individuals against all the possibilities which may occur, is establishing a degree of responsibility quite beyond any legal limitations which have yet been declared. We are of opinion that in the fact of the present case the direct and immediately producing cause of Mrs. Trich's injury was her being struck by a runaway horse and buggy over

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which the defendant company had no sort of control and for which it is not responsible, and therefore we conclude that the proximate cause of the injury, in the legal sense, was the collision of the horse and buggy with the person of Mrs Trich, and not the negligence of the defendant.

The case of *West Mahanoy v. Watson* came again into this court, and is reported in 19 *Weekly Notes*, 441. The present chief justice, in delivering the opinion of the court, said: "These facts narrow the case down to the single question, was the upset at the ash-heap on the township road the immediate or direct cause of the loss of the horses? As we have seen, the facts themselves answer this interrogatory in the negative, and necessarily determine the case in favor of the plaintiff in error. In the case of *Hoag v. Lake Shore & Michigan Southern R. R. Co.* (85 *Pa.* 293), Mr. Justice TRUNKY, then president of the common pleas of Venango county, in his charge to the jury on the trial of the above-named case, said: 'The immediate and not the remote cause is to be considered. This maxim is not to be controlled by time or distance, but by the succession of events. The question is, did the cause alleged produce its effect without another cause intervening, or was it to operate through or by means of this intervening cause? As the principle here stated was adopted by the affirmance of this court following *Pennsylvania R. R. v. Kerr* (62 *Pa.* 353), we may regard it as the settled law of this State."

In the facts of the present case we find a perfect illustration of this principle. Mrs. Trich herself testified that when she was "bounced" from the car she fell on her feet. Immediately after she was struck by the runaway horse and buggy, and from them received her injury. The jolting from the car simply landed her on her feet and inflicted no injury. But another agency intervened which was entirely independent of any act of the defendant, and that agency alone inflicted the injury in question. Following the doctrine of the last case cited we feel clearly obliged to hold that the plaintiff's injury was inflicted by the special intervening agency stated, and therefore the defendant is not liable. In all of the cases cited, as in several others not referred to this court finally determined them upon its own view of the facts without regard to the verdicts of the juries. The defendant's point should have been affirmed.

Judgment reversed.

Opinion by GREEN, J.

TRUNKY and CLARK, JJ., absent.

Proximate and Remote Cause, continued.

Where several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the acci-

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dent would not have happened, it may be attributed to all or any of the causes, but it cannot be attributable to a cause, *unless, without its operation*, the accident would not have happened (*Ring v. City*, 77 *N. Y.* 83, 89, 90. *S. P.*, *Ehrgott v. Mayor*, 96 *Id.* 283). Where the fact is that the damages claimed in an action were occasioned by one of two causes, for one of which the defendant is responsible, and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause (*Searles v. Manhattan*, 101 *N. Y.* 662; *Taylor v. City*, 105 *Id.* 203; and see 49 *Hun*, 376, 403).

**Liability of Joint Wrong-doers—Negligence of Plaintiff's
Carrier in such a case not imputable to him.**

The supreme court of Pennsylvania, in Borough of Carlisle v. Brisbane (*Chicago Legal News*, March 5, 1887), reviewed the law indicated in the head-note, as laid down in Pennsylvania and New York, as follows.

CLARK, J.—The general rule of the law undoubtedly is, where one suffers an injury through the concurrent negligence of two or more persons, they are jointly liable, and may be proceeded against for damages sustained, either jointly or severally, at the option of the party injured, unless the latter, by his own negligence, has contributed to the injury, in which case the law will not afford him any remedy whatever against any or all of the persons whose wrong, in concurrence with his own, caused the injury. The rule is, however not without its exceptions. Where goods in the hands of a common carrier are injured by the negligent act of a third party, to which the negligence of the carrier contributes, and an action is brought by the owner against the third party, the carrier's contributory negligence is a good defense (*Vanderplank v. Miller*, *Mod. & M.* 169; *Simpson v. Hand*, 6 *Whart.* 311). So also where a passenger is personally injured by the joint negligence of his carrier and another party, his remedy is against the common carrier alone. The latter question was first raised in this court, and was very fully discussed, in the case of *Lockhart v. Lichtenthaler*, 46 *Pa. St.* 151. The decision in that case was grounded upon the doctrine of the English cases, *Bridge v. Grand Junction Ry. Co.*, 3 *Mees. & W.* 247 (1838, in the court of exchequer); *Thorogood v. Bryan*, 65 *E. C. L.* 114, and *Cattlin v. Hills*, *Id.* 123 (in the common bench, 1849). These cases have since been followed and approved in the exchequer by *Armstrong v. Lancashire & Y. Ry. Co.*, 44 *L. J. Exch.* 89. The principle upon which these English cases appear to have been determined is that the passenger is so far identified with the carriage in which he

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is traveling that want of care on the part of the driver will be a defense of the owner of the other carriage that directly caused the injury.

Our own case of *Lockhart v. Lichtenthaler*, *supra*, was followed by *Philadelphia & R. R. Co. v. Boyer*, 97 Pa. St. 91, an action against the railroad company to recover damages for the death of a person caused by a collision of the defendant's train with a street-car in which the deceased was a passenger. It was held, that in order to recover, the plaintiffs must show not only that the death resulted directly from the defendant's negligence, but that the negligence of the carrier company did not contribute to the result. Therefore, although there is certainly a wide difference of opinion between the courts of this and other States on the subject, it seems to be well settled as the law of Pennsylvania that the remedy of a passenger injured by the joint negligence of his carrier and another is against the common carrier only.

Cornman, however, was not a common carrier. He was the owner of the horse and sleigh, and was the driver. Brisbane was a friend of Cornman's, visiting Carlisle, and occupied a seat in the sleigh by his invitation. The accident occurred while returning from a visit to the poor-house. Nor was Cornman the servant of Brisbane. As the driver, he was neither under Brisbane's direction nor control, nor was Brisbane under his control. Brisbane had simply accepted the friendly offer of a seat in Cornman's sleigh. He had a right to expect from Cornman ordinary skill and care in the management of the conveyance, and precisely the same degree of care from the municipality of the borough of Carlisle in the condition and repair of the streets over which they might pass. There is no evidence whatever that Brisbane knew that Cornman was a reckless or unskillful driver, or that he saw, or by the exercise of reasonable care at the time could see, or ought to have seen, the dangerous condition of the street. Indeed, the jury has found that he was not personally aware of either, and no question can arise involving this view of the case.

It is said, however, that although there is no evidence of any actual negligence on the part of Brisbane, upon the principle of *Lockhart v. Lichtenthaler* the negligence of Cornman is to be imputed to him.

The rationale of the rule in *Thorogood v. Bryan*, is said by COLTON, J., to be the identity of the passenger with his own vehicle; but in *Lockhart v. Lichtenthaler* this reason is rejected, and we think the foundation of the principle is expressed by Mr. Justice THOMPSON with much more care and accuracy, as follows: "I would say the reason for it is that it better accords with the policy of the

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law to hold the carrier alone responsible in such circumstances as an incentive to care and diligence. As the law fixes responsibility upon a different principle in the case of the carrier, as already noticed, from that of a party who does not stand in that relation to the party injured, the very philosophy of the requirement of greater care is that he shall be answerable for omitting any duty which the law has defined as his rule and guide, and will not permit him to escape by imputing negligence of a less culpable character to others, but sufficient to render them liable for the consequences of his own. It would be altogether more just to hold liable him who has engaged to observe the highest degree of diligence and care, and has been compensated for so doing, rather than him upon whom no such obligation rests, and who, not being compensated for the observance of such a degree of care, acts only on the duty to observe ordinary care, and may not be aware even of the presence of a party who might be injured."

When the reason of a rule of law ceases, the rule itself ceases. The law fixes the responsibility of the persons or parties involved in this transaction upon precisely the same basis. There is certainly no policy of law which requires that the driver of a private carriage or sleigh, who, actuated by the motives of kindness alone, and without compensation, may undertake to convey a friend through the streets of a city or town, shall be held to a higher standard of care toward that friend than the city or town through whose streets they pass. Both Cornman and the municipality of Carlisle borough were bound to Brisbane for the exercise of ordinary care and diligence only. If Cornman had been a common carrier, he would have been a carrier for compensation, and would have been obliged to observe the highest degree of diligence and care. The policy of the law in such a case, it is said, would not permit him to escape by interposing the negligence of others of a less culpable character. The doctrine declared in *Lockhart v. Lichtenthaler* and *Philadelphia & R. R. Co. v. Boyer* is not applicable to this case, and there is no sound principle of law which will preclude the plaintiff from seeking redress from both or either of the persons through whose negligence he was injured. Brisbane was answerable for his own negligence alone. The negligence of Cornman under the circumstances cannot be imputed to him so as to bar his recovery in this case.

The case at bar is in every respect similar to the case of *Robinson v. New York Cent. and H. R. R. Co.*, 66 N. Y. 11, where a female accepted an invitation to ride in a buggy with a person who was entirely competent to manage a horse, and it was held that if the defendant company was negligent, and the plaintiff free from negli-

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gence herself, she might recover from the company, although the driver of the buggy might have been guilty of negligence which contributed to the injury. This case was followed by *Dyer v. Erie R.*, 71 N. Y. 228. Mr. Justice MILLER, delivering the opinion of the court, says: "It is insisted that the court erred in charging the jury that the negligence of Stimpson was no bar to the action, and that the negligence of the driver would not prevent a recovery. The solution of the question raised must depend on the position which Stimpson occupied toward the plaintiff. The plaintiff rode with Stimpson, at his invitation, gratuitously, in Stimpson's wagon. The latter, driving the team, exercised entire control over it, and was traveling entirely on business of his own. Stimpson was not hired by the plaintiff, or in his employ, or in any sense his agent, nor had the plaintiff any control or direction of the team, or its management, or over Stimpson himself. There is no pretense but that Stimpson was entirely competent to take charge of the team himself, nor that he did not possess the requisite skill to manage and control the same. It is difficult to see upon what principle the negligence of Stimpson can affect the plaintiff, or be imputed to him."

These causes in New York were afterward followed by *Masterson v. New York Cent. & H. R. R. Co.*, 84 N. Y. 247, which is to the same effect. It is true that the authority of these cases may be supposed to be somewhat impaired in Pennsylvania, by the fact that in *New York the rule of Thorogood v. Bryan* has been repudiated. (*Chapman v. New Haven R. Co.*, 19 N. Y. 341); but as we hold the rule of policy only to apply to the case of a common carrier, there is no reason to discredit the authority of that court in cases where this rule of policy does not apply.

In this view it is not important what Cornman may have previously known as to the condition of the road; and as it is shown that Brisbane never had any knowledge of it the case was to be considered by the jury, so far as Brisbane is concerned, just as if both were passing over the road for the first time. A stranger, in the twilight, or when snow was on the ground, as a matter of fact, might certainly assume that the center of a public road or street within the corporate limits of a populous town, over which hundreds of wagons passed every day, especially if no other route is plainly designated, was in a passable condition.

In the consideration of a question of negligence on the part of a stranger, certainly under such circumstances, it was proper to show that he took the center, and not the side, of the opened street. There may be cases where the conformation of the ground itself would clearly indicate that the center of a public road is not the traveled

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route, and in such case this circumstance may be sufficient to give notice ; but in all ordinary cases the center of a public street, passing between the open lots of a populous town, in the usual course of travel, and in the night time, or when the route is obscured by snow, may be taken as the traveled route. If the municipal officers caused an obstruction to be placed on part of the highway, it was their duty to give some appropriate warning of the fact.

Nor can we see any valid objection to the evidence showing where the actual traveled route was before the street was macadamized. If there was nothing to indicate to a stranger that the route for travel was at the side of the road, we have said he might assume the route to be in the center. How, then, could it harm the defendant to show that the route had previously been in the center, although the plaintiff did not know the fact ? The evidence was clearly competent, however. Its tendency was to show that the only obstruction of the street was that which the officers of the municipality had themselves negligently placed there, and that there was nothing in the natural conformation of the ground to prevent the use of the central part of the road at this point, or to warn the plaintiff that the traveled route was not in the center, but along the side of the street. It is an undoubted, and, indeed, an undisputed fact, that the center of the street had been the usual course of travel, and we think it was certainly competent to show it. The learned court very plainly instructed the jury that if the way provided was safe, convenient, and so well marked that no man of ordinary prudence could mistake it, it was not necessary that it should have been along the middle of the street, and that in providing such a way at the side of the street they did their whole duty to the public, unless on the central part, where it had previously been used as the highway, they placed a dangerous obstruction, without giving any warning of the fact.

The principle upon which this evidence was admitted is, perhaps, inaccurately stated ; but, as the proof was properly received, we can not reverse upon the ground that proper reasons were not assigned for its admission.

The judgment is affirmed.

Contributory Negligence of Driver of vehicle not chargeable to Innocent Passenger.

Beside the cases referred to in the previous decision attention is called to the following recent decision by the Maryland court of appeals.

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The contributory negligence of a carrier, or of the driver of a public or private vehicle, not owned nor controlled by the passenger, and who is himself without fault, will not constitute a bar to the right of the passenger to recover for injuries received (*Philadelphia, Wilmington & Baltimore R. R. Co., v. Hogeland*).

Privity in Negligence.

The decision of the supreme court of Ohio in *Harriman v. Pittsburgh, C., &c. R. Co.* (March 22, 1887; 12 *Northeastern Rep.* 451), turns on an interesting question of the law of privity in negligence analogous to the famous squib case. In this case, a train of cars, passing over some signal torpedoes, left one unexploded, which was picked up by a boy nine years old, at a point on the track which he and other children, in common with the general public, had long been accustomed to use as a crossing, with the knowledge and without the disapproval of the company. He carried it into a crowd of boys near by, and, not knowing what it was, attempted to open it. It exploded and injured the plaintiff, a boy ten years of age. *Held*, that the act of the boy who picked up the torpedo was only a contributory condition, which the company's servants should have anticipated as a probable consequence of their negligence in leaving the torpedo where they did, and that that negligence was the direct cause of the injury suffered by the plaintiff.

The fact that signal torpedoes, negligently placed upon a track by train men, who were authorized to use them in the management of the train, were put there when there was no necessity for doing so, and contrary to the rules of the company, does not exempt the company from liability to one injured, without any contributing fault, by such improper and negligent use of the torpedoes.

The court says, on the question whether the negligence of the defendant's servants was the proximate cause of the injury: "The claim is that the casual connection between the injury and the negligent act is broken by the intervention of the boy Brown, and that his wrongful or careless act was the immediate cause of the injury to plaintiff. This does not seem to be much insisted upon. And, indeed, since the leading case of *Lynch v. Nurdin* (1 *Q. B.* 29), there is an almost unbroken line of authorities to the effect that such intervening cause cannot affect the liability of the negligent party. This will be seen from a brief reference to some of the decided cases. In *Lynch v. Nurdin* (*supra*), the defendant's servant left his cart and horse half an hour in the open street, at the door of the house in which the servant remained during that period. The plaintiff, a

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child between six and seven years old, and several other children came up, and began to play with the horse, and climb into the cart and out of it. While the plaintiff was getting down from it, another boy made the horse move, in consequence of which the plaintiff fell, and the cart passed over his leg, breaking it. The plaintiff had a verdict. Lord DENMAN, Ch. J., in sustaining the verdict, says: 'It is urged that the mischief was not produced by the mere negligence of the servant, but, at most, by that negligence in combination with two other active causes—the advance of the horse in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the cart, and so committing a trespass on the defendant's chattel. On the former of these two causes no great stress was laid, and I do not apprehend that it can be necessary to dwell upon it at any length; for, if I am guilty of negligence in leaving anything dangerous in a place where I knew it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third person, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first.' And this case also decides that the defendant was liable, although his negligence was omission, and not commission, consisting merely in leaving the horse and cart unattended, and although the plaintiff, when injured, was a trespasser. Speaking on these subjects the court says: 'If large parties of young children might reasonably be expected to resort to the spot, it would be hard to say that a case of gross negligence was not fully established;' and, again: 'Supposing the fact to be ascertained that the plaintiff merely indulged the natural instincts of a child in amusing himself with the empty cart, and deserted horse, though a trespasser, the defendant cannot be permitted to avail himself of that fact.' . . . *Lynch v. Nurdin* has been generally followed in this country. We deem it unnecessary, however, to refer to any of the American cases except *Pastene v. Adams* (49 Cal. 87), and *Lane v. Atlantic Works* (111 Mass. 136)."

In the same case, the court review at some length the legal effect of the circumstance that the boy was technically a trespasser perhaps upon the premises, and claim that the company owed no duty such an one. The court say, conceding the general rule, yet "it is apparent that there may be a substantial difference between absolving the owner from the active duty of providing against the danger of accident to a trespasser upon his premises, or one who enters the same as a mere licensee, and giving him the same immunity when he knowingly places a highly explosive and dangerous instrument or

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agent in the way that he knows the licensee—a child of tender years—is habitually accustomed to go, and where an ordinarily prudent person would reasonably expect him to go, and be thereby injured. An owner may, without protest or objection, permit his premises to be used by the public so long, in the same condition, that his acquiescence in the continuation of such use, until some warning or notice on his part, might reasonably be expected; and if, under such circumstances, and with knowledge of the same, he should place or leave some new dangerous structure or instrument in the way so used, and from which he might reasonably apprehend danger or injury to those accustomed to such use, can he claim exoneration from liability in case such injury shall occur, on the ground that the law imposed no duty on him to keep his premises in a safe and suitable condition for trespassers and licensees who enter by permission only? This is the practical question here presented, and the answer thereto, as well as the reasons for the same, will appear from an examination of some of the cases referred to by counsel, and some not cited by them."

After reviewing the cases of *Kelley v. Columbus*, 41 *Ohio St.* 263; *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 *Id.* 864; *Carter v. Columbia & G. R. Co.*, 19 *S. C.* 20; *Bellefontaine & I. R. Co. v. Snyder*, 18 *Ohio St.* 399; *Lynch v. Nurdin*, 1 *Q. B.* 29; *Barry v. New York Cent. & H. R. Co.*, 92 *N. Y.* 289; *Davis v. Chicago & N. W. R. Co.*, 58 *Wis.* 646; 17 *N. W. Rep.* 406; *Bransom v. Labrot*, 81 *Ky.* 638; *Powers v. Harlow*, 53 *Mich.* 507; 19 *N. W. Rep.* 257; *Keefe v. Milwaukee & St. P. R. Co.*, 21 *Minn.* 207; *Nagel v. Missouri Pac. R. Co.*, 75 *Mo.* 653; *Sioux City & P. R. Co. v. Stout*, 17 *Wall.* 657; *Graves v. Thomas*, 95 *Ind.* 861; *Campbell v. Boyd*, 88 *N. C.* 129; *Corby v. Hill*, 4 *C. B. (N. S.)* 556, the court adds:

"In the late case of *Heaven v. Pender* (11 *Q. B. Div.* 503) it is said that a more accurate and satisfactory ground of recovery, embracing all cases of implied invitation, is to be found in the proposition that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary prudence would recognize that, if he did not use ordinary care and skill in his own conduct with regard to these circumstances, he might cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. However this may be, the phrase 'implied invitation,' in its real value and significance as derived from its application in the adjudged cases, imports knowledge by the defendant of the probable use by the plaintiff of the defendant's property, so situated and conditioned as to be open to and likely to be subjected to, such use; and it may

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be concluded that, while mere permission is not invitation, it may be implied from acquiescence by the owner in the accustomed use of his property by the public, so long in the same condition that it might reasonably be expected such use would be allowed by him to continue; or when he knowingly so imposes and leaves it to the use of children, without objection, that they, following their natural impulses, would be likely to go upon it; and in either case, it is his duty to use such care, commensurate with the danger arising from such use, as an ordinary prudent person would under the circumstances. Hence, where a railroad company has for a long time permitted the public, including children, to travel and pass habitually over its road at a given point, without objection or hindrance, it should, in the operation of its trains and management of its road, so long as it acquiesces in such use, be held to anticipate the continuance thereof; and is bound to exercise care accordingly, having due regard to such probable use, and proportioned to the probable danger to persons so using its road: and it is negligence for the servants of such company to knowingly interpose any new danger without reasonable precaution against injury therefrom. It is, therefore, unimportant whether the defendant's liability, so far as this question of negligence is concerned, be placed upon the ground of implied invitation, or be referred to that other—and, as is said, more satisfactory and accurate—statement of the rule announced in *Heaven v. Pender, supra*. Tested by either, the defendant, knowing of the probable use of its roadway by children, from the previous habitual use thereof by the public, long acquiesced in by the defendant, ought reasonably to have anticipated such use by the plaintiff and other children; and its servants, in placing and leaving the unexploded torpedo, an innocent-looking, but highly dangerous and destructive article, where they might reasonably anticipate plaintiff and other children would be likely to go and handle it and be injured, thus placing a new and hidden danger in their way, without notice or warning, failed to use such care as a person of ordinary prudence would and ought under the circumstances (*N. Y. Daily Register*).

Torrey v. Balen Agricultural and Mining Co.

City Court.

*Trial Term—March, 1887.*HERBERT G. TORREY *against* THE BALEN
AGRICULTURAL AND MINING CO.**Contract for services respecting mining lands. Performance.**

The express stipulations of a contract, where the manner and details are essential, must be complied with. The difficulty or improbability of accomplishing an undertaking will not excuse performance.

Trial by the court without a jury.

The defendant was interested in the ownership of 24,711 acres of land situated in the Province of Veragua, in the State of Panama, in the Republic of Columbia; which was supposed to contain gold and other precious metals in their original condition. The purpose of the defendant, as indicated by its name, was to use the land for agricultural and mining purposes.

In order to satisfy the promoters of the scheme that the purpose of the corporation was feasible, the plaintiff, an assayer and mining expert, was employed to go down and examine the land and report the result of his investigations. The contract provides that the plaintiff shall, on or before February 15, 1884, proceed to the property of the company, and for the use of the company do the following things:

First. Make as thorough and minute examination and survey of such property as may be necessary for the purpose of discovering and locating such mines, veins and deposits of minerals as may exist thereon, having special reference, however, to gold and silver; and giving attention first to such mines, veins or deposits of gold and

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silver as are already known to exist upon said property or that shall be pointed out to him.

Second. Prepare and deliver to the said company a written description of the situation of the property in general, its topography, with the nature, value, character, opportunity for development, and the precise locality of any mines, veins and deposits of gold, silver and other minerals, with assay of same, and the means of access and of transportation to and from such localities, with suitable maps and diagrams to enable the company readily to find such mines, veins and deposits.

Third. Establish suitable monuments and place suitable marks upon such mines, veins and deposits, and designate the same on such maps and diagrams so as to enable the company readily to find, refer to and describe such mines, veins and deposits, as well for the purpose of preparing a prospectus and offering the property for sale, as for the purpose of working the same. The position of such monuments and that of other important points shall be determined geographically by means of the latitude and longitude, and the elevation above sea level calculated by the plaintiff. For the service aforesaid, the defendant agreed to pay the plaintiff \$3,000, as follows: \$1,500 on the execution of the contract (which was paid) and the balance (\$1,500) on the completion of the work, and the rendering to the defendant at its office No. 66½ Pine street, such report, maps and diagrams on or before May 1, 1884.

The action is brought to recover the last installment (\$1,500), and the question to be determined is whether on the evidence the plaintiff has shown such a performance of the contract on his part as entitles him to a recovery. Upon the trial the plaintiff's counsel undertook to set aside the contract and recover the reasonable value of the services on the ground of constructive fraud, but the plaintiff declined to impute fraud to the officers of the defendant, and the facts seem to justify the inference

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that the plaintiff was right in his determination. The question of substantial performance is really the issue to be determined. Historians have associated the discoveries of Columbus with Veragua, and have published extravagant accounts of the mines of gold with which Veragua abounded, and the object of the plaintiff's employment evidently was to test the truth of these statements, and of similar reports made by interested parties in the neighborhood; and the particularity of detail in the contract indicates that the defendant expected something upon which its officers could pin its future prospects, hopes and acts in regard to the feasibility of entering upon and prosecuting their agricultural and mining scheme, or something which might enlighten purchasers in regard thereto, in case a sale of the lands was deemed advisable.

The intent is the life of the contract, and the question is whether this intent in regard to performance was substantially carried into execution in the manner contemplated by the parties.

Johns, Benner & Wilcox, for plaintiff.

J. M. Pray, for defendant.

MCADAM, Ch. J.—The plaintiff sailed from New York on the first of March, 1884, on the steamer *Acapulco*, and returned to New York on the fourth of April, 1884. He was absent thirty-five days. It took about fourteen days to reach the property, and about the same number of days to return, making twenty-eight days of necessary traveling. This leaves seven days upon the 24,711 acres. The plaintiff in his evidence says, "I have not claimed that I was on the actual ground over one week."

How much surveying, examining, prospecting, &c., the plaintiff did in this brief time may well be inferred from his evidence. He says, "I found it an almost inac-

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cessible country, only possible to get from one part to another by canoe up these narrow rivers, and a few trails—a trail in that country being made by a man going ahead of you with a machette or long knife, cutting down the palm trees and tangled growth which grows up there in six months so that you can't get through it without having to repeat the operation."

At another part of the testimony the plaintiff was asked the following :

" Q. From the examination you made, are you able to swear that there are no minerals, gold or silver, on the land of the company in Columbia, which you went to examine, other than that you have stated in your report?"

" A. No, sir ; because it would be contradicting my report which I gave them. My report states that, to the best of my knowledge and belief, it is not a promising outlook ; gold might be discovered there in future years."

While the outlook might not be promising to the experienced eye of the expert, the contract evidently contemplated something more than this ; for it requires the plaintiff "to make as thorough and minute examination and survey of the property as may be necessary for the purpose of discovering and locating such mines, veins and deposits of minerals as may exist thereon."

This required work, search, investigation, examination, prospecting, and the like, and the seven days spent upon the 24,711 acres was hardly sufficient time to do this conscientiously. The plaintiff evidently satisfied himself that the "outlook was not promising ;" but he did not perform his contract. The task was evidently more than he had contemplated when he undertook the employment. The key-note of the trouble is expressed by the plaintiff in these words : "I wrote letters explaining the condition, and sent a telegram, stating that from all the knowledge I had obtained up to that point *the property was far more difficult to examine than I anticipated*, and I telegraphed

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for \$500 additional money, so *I might do something for the company, and not come back and make an utter failure.*" The company was under no obligation to send the additional \$500, and the plaintiff, no doubt discouraged at the unpromising condition of affairs, returned, and made the best report he could under the circumstances. The plaintiff is no doubt a competent assayer and mining expert, and intended to do all he undertook, but, unfortunately agreed to do what he could not with the limited assistance and time he allowed himself to do the work. He testified in a fair and candid manner, and I have no reflections whatever to cast upon him or his testimony. I find, however, as matter of fact, that the contract has not been performed on his part, and this finding virtually disposes of the entire case.

STORY, in his work on Contracts (§ 968) says: "The express stipulations of a contract must be exactly performed, and [even] a substantial performance is not sufficient, where the time or the *exp ess manner and details* agreed upon are essential, and are not complied with."

If a party covenants to do an act, he is bound to perform what he undertakes; the difficulty or improbability of accomplishing the undertaking will not excuse him. Nothing short of showing that the thing to be done cannot be done will relieve him from his obligation (*Beebe v. Johnson*, 19 *Wend.* 500).

That the thing undertaken can be done, is practically conceded—an advance of \$500 more money would have assisted in doing more than was done. This the plaintiff in effect admitted when he called for the additional \$500, to prevent failure.

For these reasons, and without going into further details, which my finding has made unnecessary, there must be judgment for the defendant, with costs, and two per cent. allowance.

Synopsis of Defendant's Brief.

Contract being entire, plaintiff must show substantial performance of every material part of the contract, according to its terms

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(50 *N. Y.* 145; 56 *Id.* 665; 62 *Id.* 264; 80 *Id.* 312; 68 *Id.* 507; 75 *Id.* 16-6; 73 *Id.* 406; 85 *Id.* 407; 1 *Week. Dig.* 390).

The defects must not pervade the whole, or be so essential that the object which the parties intended is not accomplished (62 *N. Y.* 264).

Willful failure to perform prevents recovery (61 *N. Y.* 645).

What was said by the parties at the time of making the written contract is incompetent (85 *N. Y.* 412; 102 *Id.* 513).

A promise to pay cannot be implied outside of the writing (75 *N. Y.* 74; 2 *Cliff.*, 590).

There can be no recovery on *quantum meruit* (68 *N. Y.* 23; 3 *Id.* 420; 22 *Id.* 162; 20 *Id.* 312; 93 *Id.* 39, 44; 2 *Den.* 110).

If there be a written contract, it must be produced (24 *Wend.* 60, 65; 7 *Bosc.* 418).

When written contract appears, the parol evidence must be stricken out (*Abb. Trial Ev.* 62; 24 *Pa. St.* 314, 317; 102 *N. Y.* 513).

The meaning of a contract is to be gathered from a consideration of all of its provisions, and the inferences naturally derivable therefrom as to the intent and object of the parties making it, and the results intended to be accomplished by its performance (102 *N. Y.* 215).

It is a familiar rule that parol proof of extrinsic circumstances may be given to apply a description to its subject matter (102 *N. Y.* 215; citing 21 *Wend.* 651; 16 *N. Y.* 267; 47 *Id.* 221; 2 *Paige*, 11).

Evidence of custom inadmissible to interpret contract (102 *N. Y.* 652).

Amendment on trial cannot be allowed (102 *N. Y.* 513).

City Court.

Trial Term—March, 1887.

THOMAS M. WHEELER *against* THE BOWERY
SAVINGS BANK AND ABRAHAM B. VALEN-
TINE, EXECUTOR AND TRUSTEE.

S. B. V. opened an individual account with the Bowery Savings Bank. He was at that time executor of the estate of his father, Abraham Valentine. S. B. V. afterward departed this life, and the envelope containing the bank-book was indorsed, "Trust funds

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belonging to the accounts of Charles E. Valentine, Mary Jane Valentine, and John H. Valentine, with Samuel B. Valentine, Ex. and Trustee."

Charles E. Valentine, some years before the deposit was made, executed an assignment to the plaintiff of all his interest in Abraham Valentine's estate. It was claimed that the fund on deposit was part of the accumulated income from Abraham's estate, which, by the deposit and indorsement on the envelope, was specifically set apart for the said Charles E. Valentine, and, consequently, passed by his assignment to the plaintiff. *Held*, that on the facts stated, no title passed in the deposit to Charles E. Valentine, or to his assignee. It is doubtful whether a trustee can create a trust in funds held by him in trust.

Trial by the court without a jury.

T. M. Wheeler, plaintiff in person.

Israel Minor, Jr., for A. B. Valentine, executor, etc.

MCADAM, Ch. J.—Samuel B. Valentine, in his individual name, opened an account with the Bowery Savings Bank. The deposit-book shows the following sums to his credit:

1876, June 21.....	\$600 00
1877, Interest to January.....	18 00
1878, " " ".....	21 23
January 9.....	105 00
1882, Interest to January.....	102 44
Total	\$846 67

Samuel M. Valentine was the executor under the last will and testament of Abraham Valentine, deceased. Samuel M. Valentine died in August, 1884, and the defendant, Abraham B. Valentine, was appointed administrator of the goods of the said Abraham Valentine, and trustee of the unexecuted trusts created by Abraham's will. In other words, the defendant, Abraham B., represents the unexecuted trusts under the will in which Samuel M. was

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executor and trustee. Upon the death of Samuel M., his executors made no claim to the fund on deposit; but this is not an important circumstance, because all the parties to this record found their claims to the fund on the theory that Samuel M. had no individual title to the fund—that it was a trust fund belonging to the estate of Abraham, the original testator, of whose will Samuel M. was executor.

The plaintiff claimed the fund, and sued the Bowery Savings Bank to recover it. The defendant, Abraham B. Valentine, as administrator of the goods of Abraham, and as trustee of the unexecuted trusts created by his will, made claim to the fund. The Bowery Savings Bank thereupon moved to interplead the rival claimant, the application was granted, and the bank was dropped from the record, leaving the rival claimants to settle their disputed title to the fund on deposit, and the question to be determined is to whom the fund belongs. I begin with the conceded fact that the deposit, although made in the individual name of Samuel B. Valentine, was of funds belonging to the estate of Abraham Valentine, deceased, of which Samuel B. was executor and trustee. The fund therefore goes to Abraham B., as the present legal representative of that estate, unless the plaintiff has established legal title thereto. The plaintiff bases his claim upon an assignment executed by Charles E. Valentine, one of the beneficiaries under the will of Abraham. It is dated July 30, 1870, and transfers to the plaintiff "all my right, title and interest in and to the distributive share of my grandfather Abraham Valentine, deceased, of whatever kind and nature, now due or to become due to me, as one of the legatees under and by the provisions of the last will and testament of the said Abraham Valentine." The assignment relates solely to an interest in the estate of Abraham Valentine, deceased, but in no way to the fund on deposit, for the deposit was made nearly six years after the assignment was executed. Whether the assignment offends the provisions of the statute in regard to beneficial

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interests in the income of a trust estate need hardly be considered, in the view I take of this contention. This is not a suit by a legatee (or his assignee) to recover his interest in the estate, for that would be of equitable cognizance, and the presence of other parties upon the record might be necessary (*Pelletreau v. Eden*, 18 *Johns.* 428; *Trustees v. Fitzhugh*, 27 *N. Y.* 130). It is an ordinary action, and the question is whether the plaintiff has shown a legal title to the fund. The assignment, followed by the deposits six years afterwards, gave the plaintiff no title to the fund. It was not made in recognition of his rights, but in disregard of them. The plaintiff relies to a great extent upon the effect of an indorsement on the envelope which enclosed the bank-book. It is in these words: "Trust funds belonging to the accounts of Charles E. Valentine, Mary Jane Valentine, and John H. Valentine with Samuel M. Valentine, executor and trustee." This indorsement gave no title to the persons named (*Weber v. Bank for Savings*, 1 *City Ct.* 70; 6 *Hun*, 331; *Curry v. Powers*, 70 *N. Y.* 212); and apart from this, it is at least doubtful whether a trustee can create a trust in funds held by him in trust. The plaintiff contends that the money deposited was part of the surplus income from the estate which Samuel M. had no right to accumulate; that by the deposit he effectually separated it from the trust estate; that it ceased to form part of it; that it was specifically appropriated to Charles E. Valentine; and that, as Charles E. was entitled to it, it follows that the plaintiff as legal assignee succeeded to this title.

But as a matter of law I find that Charles E. could not have recovered the deposit, and hence the plaintiff as his assignee never acquired title to it.

Upon the proofs this court can give the plaintiff no relief. The complaint will, therefore, be dismissed, without prejudice to any relief by bill in equity to which the plaintiff supposes himself entitled.

Covenant against Nuisance.

Assignments of Interests in Income of Trust Estate.

Such assignments void,—see 1 *R. S.* 730, § 76; *Id.* 773, § 2; *Folles v. Wood*, 99 *N. Y.* 616; *Williams v. Thorne*, 70 *Id.* 270. Extended to interests in income of personal property. *Graff v. Bennett*, 31 *N. Y.* 9, 13. Only a trust to receive rents and profits and apply them to use of a person generally, or to accumulate them generally for benefit of one or more minors, renders estate inalienable (97 *N. Y.* 31). The interest, when fixed and vested, is assignable (*Code*, § 1910; *Moore v. Littell*, 41 *N. Y.* 66). Trust for payment of a sum in gross is assignable (1 *R. S.* 730, § 63; 7 *Paige*, 221; affirmed, 20 *Wend.* 564).

Surplus Income

should not be accumulated, but paid over (*R. S.* 3 Banks' ed. 225; 42 *Hun*, 636; *Estate of Tilden*, 3 *N. Y. St. Rep.* 219).

COVENANT AGAINST NUISANCE.

A provision inserted in a mortgage, that "no part of the premises conveyed are to be used for any trade, business, or purpose that will prove a nuisance to the owners of the adjoining premises" is inoperative as a covenant running with the land. The foreclosure of such a mortgage does not continue the inhibition. As such a provision does not inhibit any particular trade, calling, or purpose, it is not such a covenant as amounts to an incumbrance, even if contained in a grant. It merely restricts the use for purposes which may prove a nuisance to neighboring premises. The law, which is impressed on every grant, inhibits such a use, and no force is added to the inhibition by the insertion of these words in the instrument.

The following question, submitted to Chief Justice MCADAM for opinion, May 19, 1887, by the attorneys of the vendor and vendee, under a contract for the sale of the property affected, may prove interesting.

Question Submitted.

Mrs. Hoertel has entered into a contract with Felix Muldoon to purchase "all that certain lot, piece, or parcel of land with the building now thereon situate, and now

Covenant against Nuisance.

known by the street number 219 West Thirty-first Street, in the City of New York."

The premises are to be conveyed to her by "a proper deed, containing the general warranty, and the usual full covenants for the conveying and assuring to her the fee simple of the said premises, free from all incumbrance."

James R. Whiting was seized in fee simple of two lots, including the premises in question. In 1835 he conveyed the same as follows, by a full covenant warranty deed :

James R. Whiting and wife to William H. Freeland. Deed dated September 21, 1835, recorded, September 26, 1835, lib. 343, p. 109. Conveys the premises as described in the following mortgage, except that the deed contains no covenant against nuisances.

William H. Freeland to James R. Whiting. Mortgage dated September 21, 1835, recorded, September 26, 1835, lib. 190, p. 417. Mortgages as security for part of purchase money all these ten lots, pieces, or parcels of land known and distinguished on a certain map made by George B. Smith, one of the city surveyors, and dated June 8, 1825, filed in the office of the register in and for the city and county of New York, which said map is numbered 51, without a case, and which said lots are known on the said map by the numbers, 61, 62, 63, 64, 65, 38, 39, 40, 41, 42, and are bounded as follows, to wit, southwesterly by Thirty-first Street; northwesterly by lots Nos. 66 and 37, *northwesterly* by Thirty-second Street, and southeasterly by lots numbers 43 and 60; each lot containing in front and rear 25 feet, and in length on each side 98 feet and 9 inches, and also one-half of the street immediately in front of said lots on Thirty-first and Thirty-second Streets.

Immediately below the description follow these words, "*no part of the premises hereby conveyed is to be used for any trade, business, or purpose that would prove a nuisance to the owners of the adjoining premises.*"

The above mortgage was foreclosed by suit in the court

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of chancery, the decree being filed December 13, 1842, and the premises were sold by the following deed.

Philo T. Ruggles, Master in Chancery, to Charles Whiting, master's deed, dated, March 1, 1843, recorded, March 3, 1843; liber 434, p. 47. Conveys the same ten lots by the same description as above written.

Charles Whiting, the above purchaser, conveyed the premises by full covenant warranty deed, dated December 31, 1858, *without any restrictions whatever*, and Mr. Muldoon, the present vendor, is the third of the intermediate grantees, all of whom derived title by full covenant warranty deeds *without any restrictive clause soever*.

The questions submitted are :

1. Does the clause at the end of the description in the above-mentioned mortgage constitute a valid covenant so as to run with the land? .

2. Was this covenant extinguished by the foreclosure of the mortgage?

3. Could the master in chancery by his deed revive the covenant, so as to make it run with the land, and give the right to the present owners of the other nine lots to enforce it by injunction, and are the words "heirs and assigns" requisite and necessary to make the restriction a covenant running with the land?

4. Can Mrs. Hoertel, the present purchaser, obtain a good title to said premises (which is lot No. 61 on the said map) from Mr. Muldoon, free from any restrictions as to the use and occupation of the same by reason of the matters above set forth?

5. If the last question is answered in the negative, what will be the proper course for Mrs. Hoertel to take, and what if any would be the damages she could recover in an action to rescind or enforce the contract?

We desire to state herewith that it was and is the intention of Mrs. Hoertel to erect a bakery on the premises, with stables in the rear for the accommodation of her horses and wagons, which are numerous.

Covenant against Nuisance.

Opinion.

The provision in the mortgage at the end of the description, that "no part of the premises conveyed is to be used for any trade, business or purpose that will prove a nuisance to the owners of the adjoining premises" is inoperative as a covenant running with the land, and (2) does not restrain the use of the property for any lawful object. These are the two propositions involved, and before discussing them it may be conceded that a covenant against nuisances (properly so called) constitutes an incumbrance sufficient to warrant a purchaser in rejecting a title (see cases collated in *Van Derminden v. Essig*, 2 *City Ct.* 38). *First*. The provision is inoperative as a covenant running with the land, because it is neither a condition nor a covenant contained in a grant of the land. It is not even a covenant by the mortgagee in respect to the property. The use remained in the mortgagor, and the provision is, at most, an implied promise on the part of the mortgagor not to use the property during his possession for any purpose that might prove a nuisance to the adjoining owners. It was a promise that would have passed to the *personal* representatives of the mortgagee and would have been enforceable by them. It was solely for the benefit of the mortgagee and his personal representatives, and would have been discharged by payment of the mortgage debt. No adjoining owner could have enforced it prior to or after payment of the mortgage. The mortgagee never owned the fee. He had no attribute of ownership in the land. A mortgage is a mere chose in action secured by a lien upon the land (*Packer v. Rochester & S. R. R. Co.*, 17 *N. Y.* 283; *Power v. Lester*, 23 *Id.* 527; *Trium*, 54 *Id.* 604).

The foreclosure of the mortgage gave the mortgagee no ownership in the land. It merely merged the mortgage debt in the judgment. The purchaser at the master's sale acquired the estate of the mortgagor and the interest of the mortgagee. When the two interests

Covenant against Nuisance.

became united in the purchaser, the promise of the mortgagor terminated, and could be revived only by its continuance or recognition in subsequent grants by the purchaser. The purchaser did not revive or continue the promise, but extinguished it by the execution of grants conveying the fee of the property unrestricted.

The master in chancery could create no charge on the land, and the reiteration of the words added to the description created no limitation on the estate and imposed no valid restriction. The master was a mere *conduit* through whom the title of the mortgagor and interest of the mortgagee passed. He had no interest or estate of his own, and acted merely as the channel through which the interests of all parties passed to the purchaser at the judicial sale. The purchaser at this sale conveyed by full covenant warranty deeds, and his vendees acquired good title without any restriction whatever as to the use of the property. Covenants are not implied in conveyances (2 *R. S.* 6th ed. 119, § 161). Conditions leading to forfeiture or restricting the free use of property for lawful objects are strictly construed because they tend to impair and destroy estates. They will not be sustained by inference, nor unless the plain language of the covenant requires that punitive result (*Woodworth v. Paine*, 74 *N. Y.* 199. See also 64 *N. Y.* 33; 2 *How. Pr. N. S.* 391). I am clearly of opinion that the provision aforesaid is inoperative in respect to the title offered by Mr. Muldoon.

Second. The provision does not restrict the use of the property. It does not inhibit any particular trade, calling or purpose. It simply requires that the property shall not be used for any purpose that may "prove a nuisance to the owners of the adjoining premises." Why such a provision should be inserted in any conveyance is difficult to imagine, for the law, which is impressed upon every conveyance, inhibits such a use. No man can use his property in any manner that "may prove a nuisance

In re Hampe.

to the owners of the adjoining property," whether restricted by the language of the grant or not. The neighboring owners are not to determine whether the mode of occupation "proves a nuisance;" this is left to the determination of the law.

The provision, therefore, does not fall within that class of cases where a particular use, not *per se* a nuisance, is especially inhibited in the conveyance. Such a provision is an incumbrance. A general prohibition against "unlawful" uses is not. My opinion is that the words contained in the mortgage and in the master's deed executed on the sale under foreclosure of the mortgage constitute no objection whatever to the title offered.

The title was passed on this opinion, the old house taken down, and a manufacturing establishment put up covering the entire lot. No litigation followed.

City Court.

Chambers—May, 1887,

IN RE HAMPE.

First cousins may lawfully intermarry.
See note as to the Marriage of Minors.

MCADAM, Ch. J.—The parties apply to have the marriage ceremony performed pursuant to a mutual promise to marry. They are first cousins; and the question is, whether, on the ground of affinity, there is any law of this State which disqualifies them from entering into the marriage state. I find no prohibition in the statutes (3 *R. S.* 7 ed. 2332, § 3), nor any intimation against the right in the elementary works (1 *Bishop on Mar.* § 319); but direct authority in its favor (1 *Broom & Hadley's Com.*

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Wait's Notes, 350). The ceremony may, therefore, be legally performed.

Marriage of Minors.

THE NEW LAW FIXING THE AGE OF CONSENT—CRIMINAL LIABILITY OF
CLERGYMEN AND MAGISTRATES.

To the Editor of the New York Times :

The Legislature at its last session passed an act amending the Revised Statutes in regard to marriage (*Laws* 1887, ch. 24), by providing that "the age of legal consent for contracting marriage shall be eighteen years in the case of males and sixteen years in the case of females." The evident aim of the act was to prevent marriages under the prescribed ages; but no penalties are imposed on the parties, nor are marriages under the ages specified declared void; hence it may be claimed, and not without authority, that they are voidable only under section 1743 of the Code, which provides that a marriage contract may be annulled because "one or both of the parties had not attained the age of legal consent." By the common law, males may marry at the age of fourteen, and females at the age of twelve (2 *Kent Comm.* 73). This was fixed as the age of consent, and the marriage of parties at those ages, even without the consent of their parents, was valid (*Bennett v. Smith*, 21 *Barb.* 440).

A common law, a marriage contracted under the age of consent was not regarded as void, but only as an imperfect marriage, valid unless voided by the parties after their arrival at the age of consent (1 *Bishop on Mar. & Div.* §§ 145, 148). The Iowa statute provided "that male persons of the age of eighteen years, and female persons of the age of fourteen years . . . may be joined in marriage," and this was held not to alter the common law; but infants below those ages, and within the common-law ages of consent, might still marry (*Goodwin v. Thompson*, 2 *Greene [Iowa]* 329). In North Carolina, a construction founded on a like reason with the Iowa one, was adopted. The statute provided that, "females under the age of fourteen, and males under the age of sixteen years, shall be incapable of contracting marriage," and parties having married under those ages, yet continued to cohabit until they had passed those ages, the court held the marriage to be good as at common law. Said *PARSONS*, Ch. J., "In the opinion of this court the only effect of the statute was to make sixteen instead of fourteen years in respect to males, and fourteen instead of twelve years in respect to females, the ages at which the parties respectively were capable of making a per-

In re Hampe.

fect marriage, leaving the rule of the common law unaltered in other respects" (*Koonie v. Wallace*, 7 *Jones* [N. C.] 194, 196).

These decisions show the tendency of the courts to uphold marriages when followed by consummation, and this on grounds of public policy; for, as was said by VANN, J., in *Moot v. Moot* (37 *Hun*, 294): "When cohabitation has followed the marriage, the interests of society become involved, and may prevent courts from interfering, except in extreme cases, as private rights must sometimes yield to public policy." The common-law rule of fourteen in males and twelve in females as the age of consent, was derived from the civil law; also substantially from the canon. It originated in the warm climate of Italy, and it has been thought not entirely suited to more northern latitudes (*Bishop on Mar. & Div.* § 145). In the revision of the statutes the age of consent was fixed at seventeen for males and at fourteen for females; but so deep-rooted had the common-law rule become, that the section was repealed by chapter 320 of the Laws of 1830—the Legislature of that year having arrived at the conclusion that, owing to the delicate nature of the marital relation, and the complications growing out of it, the common-law rule had better be allowed to stand.

While a marriage in this State, contracted under the age of consent fixed by the statute, may become valid, if followed by cohabitation after the arrival of the parties at that age, there are consequences entailed which seriously affect the clergyman or magistrate performing the ceremony. Section 282 of the Penal Code provides that "a person who takes a female under the age of sixteen years without the consent of her father, mother, guardian, or other person having charge of her person . . . for the purpose of marriage . . . is guilty of abduction, and punishable by imprisonment for not more than five years, or by a fine of not more than \$1,000, or both." The presence of the parents or guardian may shield the clergyman or magistrate from trouble under this section, yet if he marries a male person under eighteen or female under sixteen, the clergyman or magistrate is, since the act of 1887, before referred to, guilty of a misdemeanor, even though the parents are present and consent to the ceremony. Section 376 of the Penal Code, which covers the case, is as follows: "A minister or magistrate who solemnizes a marriage when either of the parties is known to him to be under the age of legal consent . . . is guilty of a misdemeanor."

The punishment is "by imprisonment in a penitentiary or county jail for not more than one year, or by a fine of not more than \$500, or by both" (*Penal Code* § 15). The duty of ascertaining the ages of the parties is by statute cast upon the person solemnizing the mar-

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riage (3 R. S. 6 ed. 148, § 9), and for this purpose he may examine the parties, or any other person, under oath, which he is authorized to administer. The examination is to be reduced to writing, and subscribed by the parties, and persons making false statements under this oath are to be deemed guilty of willful and corrupt perjury (*Id.* 10). If the person officiating exercises every diligence, this precaution may relieve him from penal consequences, but inattention and consequent ignorance as to the ages of the contracting parties will not. Clergymen and magistrates should be informed of the new law, that they may appreciate their duty and responsibility thereunder. In marrying young people, let them ascertain beyond all reasonable doubt that the persons applying to be married are of the age of consent specified in the act of 1887, so that they may be able to prove, if called upon to do so, that the marriage meets this legal requirement.

DAVID MCADAM.

(From the *New York Daily Times*, July 16, 1887.)

City Court.

Special Term—May, 1887.

BROWN ET AL. against MAPLESON.

The legal fee for the service of a summons is \$1, and 6 cents for each mile traveled in performing the service.

MCADAM, Ch. J.—The legal fee for the service of a summons is \$1, and 6 cents for each mile traveled in performing the duty (*Code*, § 3307). As the mileage is not proved, the fee should have been taxed \$1.06. The fee is unaffected by the amount of time spent, or the difficulties which beset the service. The law imposes the duty, and the statute prescribes the compensation, which can neither be increased nor diminished by the courts. The \$10 paid by the plaintiffs as an incentive to extra effort, was in the nature of a gratuity, which cannot be charged to the defendant.

The clerk will retax accordingly.

Duncan v. Western Union Mining Co.

City Court.

*Special Term—May, 1887.*HOWELL *against* VEITH ET AL.

Defendants appearing by different attorneys and interposing separate answers are not entitled to separate bills of costs, if the attorneys so appearing are partners, or if one is the clerk of the other.

MCADAM, Ch. J.—The defendants, having interposed separate answers by different attorneys, are presumably entitled to separate bills of costs; but the plaintiff destroyed this presumption by proof that one of the attorneys who appeared is a clerk of the other attorney, occupying the same office. It was, therefore, in legal effect, an appearance by the same attorney. There was no necessity for a separate defense (*Perry v. Livingston*, 6 *How. Pr.* 404). The rule is the same where defendants appear by separate attorneys who are partners (6 *How. Pr.* 9; 5 *Id.* 104; 15 *Abb. Pr.* 75; 16 *Barb.* 593). The cases relied on by the defendant do not conflict with these views.

Taxation affirmed.

City Court.*Special Term—May, 1887.*WILLIAM H. DUNCAN *against* THE WESTERN
UNION MINING CO.

A mining corporation whose capital is fixed at \$1,000,000, of which \$999,975 is represented in Colorado property necessary for its

Genser v. Freeman.

operation, and whose working cash capital is but \$25, is *prima facie* a fraud, and not entitled to favor in any court of justice.

Motion to open judgment recovered against the corporation by default.

MCADAM, Ch. J.—The judgment herein was recovered May 12, 1886, for \$2,017.12, and has proved unproductive. The defendant's capital was fixed at \$1,000,000, divided into shares of \$5 each, of which \$999,975 was represented in Colorado property, said to be "necessary to its operations," and the working capital was \$25. Such a corporation is *prima facie* a fraud, and should not be favored in a court of justice. The judgment was recovered six months ago, and should not be opened as matter of favor, except upon giving a bond with two sureties, conditioned to pay any judgment which the plaintiff may ultimately recover. If this bond is approved of within five days, the judgment will be opened without costs. To impose costs (even if they were but \$25) would be to divert the entire cash capital of the defendant to the defense of this action. If these terms are not complied with, the motion will be denied.

City Court.

Special Term—May, 1887.

GENSER *against* FREEMAN.

A defendant sued for breach of promise to marry pleaded infancy in defense. The jury found that he was of lawful age. The defendant waited until he became of age (according to his theory), and then moved to set the judgment aside,—*Held*, that the motion must be denied. The remedy of the defendant was to have appealed from the judgment, and reviewed the finding of the jury.

Valois v. Tompkins.

MCADAM, Ch. J.—The defendant was sued for a breach of a promise to marry. He appeared and defended the action, denying the promise, and pleading infancy. The jury were told that if they found that the defendant was an infant, to find in his favor. The proofs were conflicting, and the jury found for the plaintiff. The defendant moved for a new trial, and that was denied. He now moves to set aside the judgment, on the ground that he was then an infant, but is now of full age, and that no guardian appeared for him at the trial. The difficulty is, the jury found that the defendant was of full age at the time of the promise, and the only mode of reviewing that adjudication in this court is by appeal.

Motion denied.

City Court.

Special Term—May, 1887.

VALOIS *against* TOMPKINS.

Action against Owner of Dwelling for Overflow of Water—Pleadings. Where an owner not in occupation is sued for an overflow of water by a tenant in possession, the complaint ought to allege facts, showing specifically the breach of duty making the owner liable.

Motion to make complaint more definite and certain.

MCADAM, Ch. J.—The gravamen of the complaint is that “through the negligence, omission and breach of duty of the defendant, her agents and servants, . . . the fixtures and stock in trade of plaintiff were damaged by water leaking through from the floor above the one occupied by the plaintiff, to his damage, etc.” The defendant is the owner of the property, and not the occupant of the

Miller v. Oppenheimer.

floor from which the water came. The complaint should be made more specific in regard to the breach of duty by the defendant, its nature and the like, so that the facts charged may show the breach, instead of asking it to be inferred from the mere conclusions of the pleader.

Motion to make complaint more definite in the respects aforesaid granted, without costs.

City Court.

Special Term—May, 1887.

MILLER ET AL. *against* OPPENHEIMER.

An affidavit should allege facts, and not conclusions which are merely the affiant's opinion. It is for the court to draw inferences and conclusions, and then only from facts proved.

MCADAM, Ch. J.—The affidavit does not allege facts but conclusions which are merely the affiant's opinion. It is for the court to draw inferences and conclusions, and then only from facts or circumstances proved. Where the creditor can have no personal knowledge upon the subject, he ought to give the sources of his information so that the court may determine whether there are sufficient grounds for the affiant's opinion and belief. The affidavit is defective, and the objection to it must be sustained.

Proceedings dismissed, without costs, and without prejudice to a new application on proper papers ; no costs.

Root v. Herman.

City Court.

*Special Term—May, 1887.*G. WELLS ROOT ET AL. *against* ROSALIE HERMAN ET AL.

Suit against Joint Contractors where One is an Infant. In an action against partners all must be joined as defendants. If one pleads infancy the action may be discontinued as to him and proceed to judgment against the other defendants.

Motion for leave to discontinue action as to defendant, Max Herman, on plea of infancy.

Thomas H. Barowsky, for motion.

Horwitz & Hirschfeld, opposed.

MCADAM, Ch. J.—As a rule, an infant is not liable as a partner (1 *Parsons on Cont.* 7th ed., bottom p. 354). The rule has its exceptions (120 *Mass.* 324). In an action against the firm, the infant should be joined as a party defendant, because the defense is personal to him (*Barbour on Parties*, 2 ed. 116; 1 *Daly*, 416). Where, in an action on contract, the defendant pleads non-joinder of his copartner as a defendant, a reply that such copartner is an infant is bad on demurrer, as the contracts of an infant are voidable, not void (*Slocum v. Hooker*, 13 *Barb.* 536). The correct practice is to join all the parties as defendants. If one pleads infancy the plaintiff may enter a *nolle prosequi* against such defendant, and proceed to judgment against the other defendants (See cases collated in 13 *Barb.* 540, and 1 *Daly*, 416).

The adult defendant is in default, and, as the infant defendant has pleaded infancy in defense, the action may be discontinued as to him without costs (1 *City Ct.* 262).

Nichols v. Kelsey.

City Court.

Special Term—May, 1887.

NICHOLS *against* KELSEY.

The Half-Saturday Holiday act does not prevent the service of papers or the execution of writs in legal proceedings on that day, or any part of it, nor on any holiday.

MCADAM, Ch. J.—The recent Half-Saturday Holiday act does not prevent the service of papers or the execution of writs in legal proceedings on that day, or on any part of it.

Motion for leave to issue new execution granted.

Execution of Writs on Holidays.

In *Horton v. Biggs* (Marine Ct., MS. opinion filed March 2, 1877), a motion was made to set aside the service of an attachment because levied on a legal holiday, and the following decision was rendered.

MCADAM, Ch. J.—The objection is that the service of the attachment was made on the 22d day of February—a legal holiday.

The answer to this is, that although Washington's birthday is *dies non juridicus*,—that is, not a court day,—it neither prevents nor excuses the service or execution of legal process on that day by ministerial officers, nor does it even prevent the granting of *ex-parte* orders by what is known in practice as a judge out of court. In Mackally's case (3 *Coke*, 66), a distinction was taken between judicial and ministerial acts. The former, it was said, could not, though the latter might be performed even on Sunday, for otherwise peradventure they could never be executed (Citing *Cro. Jac.* 280, 496). This case was decided before the Statute of 29 Car. I., which made void the service of process upon Sunday. A similar statute was passed in this State (2 *R. L.* 194, published in 1813; 1 *Edm. R. S.* 628, § 69), making void the service upon the Sabbath of all writs, processes, warrants, orders, judgments, or decrees (except in certain specified cases), and subjecting the officer violating its provisions to an action at the suit of the party aggrieved. So the service of process upon an elector on an election day, in any city or town

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where he is entitled to vote, is prohibited by statute (1 *Edm. R. S.* 116, §4); but in the absence of any statutory restrictions, the service of process upon any day will be legal.

There is no statute in this State prohibiting the service of process upon what is strictly known as a *legal* holiday, and the service and execution thereof on that day are therefore legal.

Motion denied.

City Court.

Trial Term—June, 1887.

MICHAELS *against* LEVISON ET AL.

A servant always takes the risk of "known dangers," and risks which are patent need not be called to his attention. The plaintiff, an employe of the defendants, fell down stairs, and was injured. He attributed the fall to the want of lights in the hallway. *Held*, that as no lights had ever been used in the hallway, and the danger was patent, no recovery could be had.

Observation is notice, or supplies notice—which is, in effect, the same thing.

Trial by the court without a jury.

J. H. Goodman and *S. F. Higgins*, for plaintiff.

D. Leventritt, for defendant.

MCADAM, Ch. J.—The plaintiff was a workman engaged on the third floor of defendants' workshop. He generally quit work at 6 P. M. On December 6, 1885, he left the workshop as usual, and on reaching the stairway, fell, and injured himself. The action is for damages, and the negligence charged is the failure to have lights in the hallway. The plaintiff had worked on the same floor, and had traveled up and down the same stairs, for two months prior to the accident. No lights had ever been used in

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the hallway, so that the defendants did not, on the day of the injury, fail to observe any previous habit or duty. If the defendants could have foreseen the danger, it was because the peril was patent, and one which could have been as readily appreciated by the plaintiff as by the defendants.

The evidence which proves negligence against the defendants, in like manner establishes contributory negligence on the part of the plaintiff. As the plaintiff had the same means of discovering the attendant danger as the defendants, each inferentially assumed the risks the situation involved. A servant always takes the risk of "known dangers," for risks which are patent and not latent need not be called to his attention. Observation supplies notice, and where the means of information are equal, the master is not liable (*Berch on Con. Neg.* §§ 133, 140; 33 *Reporter*, 280). The teachings of common experience are sufficient to inform all that walking near a stairway in the dark is dangerous, and it requires no great degree of judgment or intelligence to enlighten one to so self-evident a fact. No defect in the stairway, or obstruction upon the hallway or stairs, was proved.

Under the circumstances, the plaintiff failed to establish any legal ground of liability against the defendants and his complaint must be dismissed, with costs.

Synopsis of Plaintiff's Points.

It is those risks alone which cannot be obviated by the adoption of reasonable measures of precaution by the master that the servant assumes (73 *N. Y.* 40; 70 *Id.* 90).

Courts will not nonsuit when any possible inference can be drawn from any of the testimony which would relieve from the charge of contributory negligence (79 *N. Y.* 464, 72; 78 *Id.* 518; 93 *Id.* 7).

If the conduct of plaintiff was such as people of ordinary prudence would adopt under the same circumstances, he was not guilty of negligence (88 *N. Y.* 51; 79 *Id.* 76, 98 *Id.* 128; 93 *Id.* 7; 11 *Hun.* 101; 41 *Id.* 512).

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Synopsis of Defendants' Points.

Defendants relied on 12 *Daly*, 437; 25 *N. Y.* 562; 12 *Hun*, 289; 26 *Week. Dig.* 207; 13 *Id.* 445; 15 *Id.* 443; and insisted that continuing in the employ, with knowledge of the defect, absolves the defendants from responsibility (*Gibson v. E. R. R. Co.*, 63 *N. Y.* 449; *Powers v. Lake E. & W. R. R. Co.*, 98 *Id.* 274; *Shaw v. Sheldon*, 5 *Cent. Rep.* 41; *Hickey v. Taaffe*, 7 *Id.* 72; *Sherman & Redfield*, § 99; *Todd v. New Bedford R. R. Co.*, 119 *Mass.* 412; 63 *N. Y.* 449; 73 *Id.* 585; 3 *N. Y. S. C.* 255). That the darkness was not attributable to defendants (*De Forest v. Jewitt*, 19 *Hun*, 509).

Duty to Light Hallways.

The New York common pleas intimate, in *Pfeiffer v. Ringler* (12 *Daly*, 439), that an employer does not owe to his workmen the duty of lighting the hallways; and in *O'Sullivan v. Norwood* (8 *St. Rep.* 388), hold that the landlord of a dwelling let in tenements to different tenants owes the duty of lighting the hallways, if this precaution is necessary to make them reasonably safe.

Need not Furnish Light.

The New York court of appeals has recently settled the question that landlords are not required to furnish artificial light in hallways of tenement houses. *Julia H. Halpin* brought suit against *Thomas C. Townsend*, as lessee, and *Mr. Coddington*, as owner in fee, of the apartment house, No. 151 Fourth Avenue, New York city, for injuries received. *Mrs. Halpin* was visiting a tenant, and, attempting to go out in the darkness, fell down stairs and broke her arm in two places, and was otherwise injured. *Townsend* and *Coddington* denied responsibility. The lower courts held that they were not bound to furnish artificial light in hallways, and the court of appeals has now unanimously affirmed the judgment on the opinion of the lower court. (See *post*, p. 417.)

Servant Assumes Known Dangers.

A servant assumes all such risks arising from his employment as he knew, or with reasonable prudence might have known, were naturally or reasonably incident thereto; and he cannot recover against the master for injuries arising from such patent risks. If the machinery furnished by the master contains obvious defects, of which the servant knew, or as a reasonably prudent man might have known, and if he continues in the service after he has discovered, or by the exercise of reasonable care might have discovered, the existence of

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such defects, he cannot recover against the master. But in cases where knowledge of the defect does not carry with it knowledge of the resulting danger, the master may be liable.

In the case at bar, the defects in the machinery whereby the injury to the plaintiff was caused, were obvious, but the plaintiff, nevertheless, continued in the employ of the defendant. Knowledge of the defects carried with it knowledge of the danger, and the plaintiff is not entitled to recover.

All servants in the employ of the same master, engaged in a common work and performing duties pertaining to the same general business, are fellow-servants. It is not necessary that the servants should be of the same grade, or engaged in the same common work. But where a superintendent is entrusted with duties incumbent upon the master, and with the supervision of the work and the employment of laborers, such person becomes a vice-principal, and is not a fellow-servant with the other servants.

The superintendent of the works of the defendant in this case is held not to be a vice-principal, but a fellow-servant of the plaintiff.

Whether, upon a given state of facts, a party is a fellow-servant or a vice-principal, is a question of law for the court (*Yates v. McCullough Iron Company*, court of appeals of Maryland, November 22, 1888).

Employee does not Assume Dangers he did not Know, and was not Bound to Anticipate.

An interesting case on the ever-recurring question of the assumption of risks by an employe is *Scanlon v. Boston & Albany Ry. Co.*, 18 No. *Eust. Rep.* 209.

The plaintiff was injured by being struck by a signal post on the line of the railroad of defendant. He was knocked from the car on which he was and bodily injured.

The supreme judicial court of Massachusetts said: "The danger—the risk of injury, which it is claimed that the plaintiff assumed—was not the particular danger from the post which caused the injury, but the general danger from structures and erections near the track. The plaintiff had no actual knowledge of the danger, and he can not be held to have assumed the risk of it, unless the character of the danger, and the circumstances are such as to show that he ought to have known and appreciated it. The fact that it was incident to the employment is not sufficient. Danger from dangerous machinery or appliances or structures is incident to employment upon them, but

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the risk is not assumed by the employe, unless he knows the danger, or unless it is so obviously incident that he will be presumed to know it. The danger in this case was not from objects casually or accidentally near the side of the car, but from permanent erections, maintained near the track by the defendant. The circumstances are not such that the plaintiff will be presumed to, or ought to have known of the danger. He did not know that there were erections so near the track as to endanger him. Such erections were, in fact, few and exceptional. Within fifteen miles of Boston there were three signal posts, one telegraph pole, and three bridges and abutments. It does not appear whether there were any others upon the road. It was the plaintiff's first trip as brakeman. He was unfamiliar with the road and with the running of trains, and was not informed that there was any such danger, or in any way cautioned in regard to it; and he had no reason to know that there were permanent erections so near the tracks as to make it dangerous for him to be upon the place on the car which was provided by the defendant.

"*Lovejoy v. Railroad Co.*, 125 *Mass.* 79, was a case in some respects very similar to this. An engineer, leaning out from the cab of his engine, was struck by a signal post. The post was one of a series equally distant from the track. The abutments of forty-six bridges, and numerous buildings, station entrances and other structures on the line of the railroad, were as near to the track. And these facts were known to the plaintiff. The court says: 'If there was any danger to the plaintiff while in the performance of his duties from the structures thus placed, it was a risk he had assumed. He knew the manner in which the road was constructed, and the proximity to the track of these structures, and the methods employed in the management of the trains. The defendant had the right to construct its road, and conduct its business in this manner; and, as was said in *Ladd v. Railroad Co.*, 119 *Mass.* 412, is not liable to one of its servants, who is capable of contracting for himself, and knows the danger attending the business in the manner in which it is conducted, for an injury resulting therefrom.'

"In *Yeaton v. Railroad Co.*, 135 *Mass.* 418, the plaintiff was employed upon a switching engine, which was used to move cars about the defendant's yard, and part of plaintiff's business was to move damaged cars, and he knew the danger that attended handling them, and sometimes examined cars to see if they were damaged. The court held that the defendant was not bound to give notice to the plaintiff that a particular car, which was in the yard to be moved, was defective, but that the plaintiff took the risk of ascertaining that fact. In the case at bar it was the general danger from permanent structures of which the defendant failed to give notice.

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"Leary v. Railroad Co., 189 Mass., 580, was the case of a fireman upon a switching engine, who was standing upon the foot-board of the engine, and was thrown off by the jolting of the engine in crossing frogs and switches. It was held that the plaintiff had full knowledge of the danger, and resumed the risk, and that the defendant was not in fault.

"In Ferren v. Railroad Co., 143 Mass. 197, the plaintiff was injured by being pressed between a car which he was pushing and a building. He knew the position of the building and of the car, but did not appreciate the peril. The court says: 'The material point of distinction between this case and many others is that here it is open to the jury to find that the plaintiff did not know or appreciate the risk of the work upon which he was engaged, and that, in the exercise of due care, he was not, as matter of law, bound to know or appreciate the same.' In the case at bar, we think that the danger was not so obviously incident to the employment that the plaintiff can be held to have assumed the risk of injury from it, and that it can not be said, as matter of law, that he was bound to know and appreciate the danger."

Contributory Negligence Defined.

Contributory negligence is such act or omission on the part of the plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of (*Beach on Cont. Neg.*).

General Note.

Contributory Negligence induced by Defendant.

The law in such cases is clearly laid down in *Beach on Contributory Negligence*, pp. 71, 72. "Where the defendant by his own neglect or wrongful act throws the plaintiff off his guard, or when the plaintiff acts, in a given instance, upon a reasonable supposition of safety induced by the defendant, when there is really danger which, but for the defendant's inducement, might be imputed to the plaintiff as negligence sufficient to prevent a recovery, such conduct on the part of the plaintiff, so induced, will not constitute contributory negligence in law, and the defendant will not be heard to say that the plaintiff's conduct under such circumstances is negligent for the purpose of a defense to the action.

"The defendant, by his own negligent conduct, which has occasioned the conduct of the plaintiff, is estopped in a certain sense from making the defense that the plaintiff's conduct was negligent, or, in

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other words, he is not allowed first to induce the plaintiff to be careless, and then to plead that carelessness as a defense to an action against him for the mischief that has been the result the defendant must not take advantage of his own wrong in such a way as that" (see also 2 *Thompson on Neg.* 1178; *Morrissey v. Wigger's Ferry Co.*, 47 *Mo.* 521).

Not negligence not to anticipate fault of another (2 *Thompson on Neg.* 1172).

Plaintiff acting erroneously under impulse of fear produced by defendant's negligence (*Id.* 1174).

Plaintiff acting erroneously in endeavoring to save life of another (*Id.* 1174),

Effect of intoxication (*Id.* 1174).

Effect of statutes (*Id.* 1175).

New York Supreme Court.

General Term, First Department—March, 1884.

JULIA H. HALPIN, against THOMAS. C. TOWNSEND, IMPEADED, &c.

The owner, lessee or occupant of a tenement is under no legal obligation to keep lights in the hallways of the house, nor to maintain hand-rails. The absence of lights or hand-rails does not prove negligence.

Appeal from a judgment entered on dismissal of complaint at circuit.

Edward P. Wilder, for appellant.

Erastus New, for respondent.

DAVIS, P. J.—The complaint in this case was dismissed on the testimony given on the part of the plaintiff. The action was to recover damages for an injury suffered by plaintiff in falling down a flight of stairs in a building of

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which the defendant was the general lessee. The defendant occupied the first story as a store, and sublet the stories above to several tenants. One of his tenants had rooms in an adjoining building from which a door opened within her rooms in defendant's building. Access to the latter was by a staircase enclosed on one side with a board partition and on the other by the wall of the building. The landing above was narrow, and from it a door opened directly into the tenant's room. There was no hand-rail to the stairs. The building was constructed in this way by the owner, who leased the same in that condition to the defendant. The sub-tenants had used it in that way for several years without injury from accidents. On the occasion of the injury sued for, the plaintiff had come to the room of the tenant, who had rooms in both buildings, on business relative to work she was doing or expected to do, and accompanied her from her room in the adjoining building to her rooms rented of the defendant, and was going thence to see the room of a gentleman in the same building, for whom she was expecting to do some washing, and in doing so, followed the tenant out of the door to her room on to the landing of the stairway, which was unlighted and dark, and as she did not see the stairway and walked forward without knowing it was there, she stepped off the landing and fell downstairs, breaking her arm and otherwise severely injuring herself. The defendant was not shown to have kept a light in the hall or to have been under any obligation to do so. It was not shown that he had changed or altered the stairway or landing in any wise ; or that there had ever been a hand-rail on the staircase. It seems clear that the defendant owed no greater degree of care to the plaintiff than to his tenant whom she accompanied. The plaintiff was lawfully there, because she was on business with her, or was acting on her invitation ; but this circumstance casts no further liability upon defendant than such as existed between him and the tenant. The tenant, whom she followed out of the room,

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gave the plaintiff no warning of danger as she stepped from a room lighted with gas into a dark hall, and plaintiff, not anticipating danger, took no precaution against it, but walked directly forward to and fell down the stairs.

Whether a hand-rail would have saved her is merely matter of conjecture. Possibly it might, but as in the darkness she would not perhaps have seen it, the probability is against it being of any service to save her fall. But assuming there was negligence on the part of defendant in not having a hand-rail on the staircase, it seems clear to us, that the plaintiff was herself negligent in stepping from a lighted room into an unknown place in the darkness where she says she could see nothing, and walking forward without inquiry or any precaution against danger. The tenant should have warned her, but her omission to do so is not negligence attributable to defendant, nor does it excuse plaintiff, so far as her relation to defendant was concerned, for any negligence of her own.

It is impossible we think, to see that on the evidence in the case the plaintiff was free from negligence which contributed to the happening of the injury.

Under such a state of facts, the rule which prevents her recovery is too well established to need the citation of authorities. The court was, therefore, right in dismissing the complaint, and the judgment must be affirmed.

DANIELS, J., concurred.

BRADY, J., dissented.

Affirmed, 107 N. Y. 683.

Talbot v. Rechlin.

City Court.

Trial Term—June, 1887.

TALBOT ET AL. *against* RECHLIN ET AL.

Statute of Limitations—New Promise—Joint Debtors. The defendants were partners, and plaintiffs dealt with them as a firm. The firm dissolved, and one of the defendants, in the name of the firm, made a new promise in writing. *Held*, that as the plaintiffs had no notice of the dissolution, both defendants were liable.

MCADAM, Ch. J.—The Statute of Limitations applies, unless the letters written by the defendant Griffith take the case out of its operation. The rule is that a new promise or payment by one of two joint obligors revives the claim against the person making the promise or payment, but not against the other (20 *Hun*, 254; 8 *N. Y.* 362; 29 *Id.* 146; 37 *N. W. R.* 379; 86 *N. Y.* 484). This rule is inapplicable here, because the defendants were partners, the claim a partnership debt, and the new promise made in the partnership name. The plaintiffs had dealt with the defendants on the faith of their partnership relation, and there is no evidence that they had notice of the dissolution of the firm, and under the circumstances the act of Griffith was the act of his firm (*Forbes v. Garfield*, 32 *Hun*, 389). The acknowledgment was sufficient under the statute (37 *Hun*, 504; 73 *N. Y.* 189; 1 *Thomp. & C.* 229).

It follows that the plaintiffs are entitled to judgment for \$350.55, with costs.

Ryan v. Metropolitan Life Ins. Co.

City Court

Trial Term—June, 1887.

**RYAN, ADMINISTRATOR, &C. against METROPOLITAN
LIFE INS. CO.**

A condition that no action shall be sustained, unless brought within a specified time, is valid.

MCADAM, Ch. J.—An insurer may prescribe any conditions to his undertaking he pleases. The condition that no action upon the policy shall be sustained, unless commenced within a certain period, stands upon the same grounds as other conditions precedent, and is valid (*May on Insurance*, § 478 and cases cited). This action, not having been brought within the prescribed time (there being no waiver of the condition) is not maintainable (14 N. Y. 253; 30 *Id.* 546, 136; 72 *Id.* 500; 78 *Id.* 462).

It follows that the defendant is entitled to judgment.

City Court.

Trial Term—June, 1887.

FLEET against WEINBERG ET AL.

A contract of purchase, where the parties intend that the property shall not be delivered, but that settlements shall be had, at appointed times, of the differences in value based on the rise or fall of the market, is void.

MCADAM, Ch. J.—Both parties testified substantially to the effect that at the time the contracts were made, it

Joyce v. McGuire.

was not their intention that the property to be bought should be delivered to or accepted by the plaintiff; on the contrary, that they expected to settle at the appointed time the differences in value, based on the rise or fall of the market. Such a contract is void (*Ball v. Davis*, 1 *St. R.* 518). If the plaintiff had testified that he intended to have carried out the contract according to its terms, expected to receive and pay for the stock at the appointed time, the question of *bona fides* would have been submitted to the jury, as in *Cyrus v. Portman* (1 *City Ct. Suppl.* 1). But on the admissions of the parties, the contract was a mere disguise for gambling, is a wager within the statute, and not enforceable (70 *N. Y.* 205).

Under the circumstances, the complaint was properly dismissed, and the motion for a new trial must be denied.

City Court.

Trial Term—June, 1887.

JOYCE, ADMINISTRATRIX, &c. against MCGUIRE.

Where a debtor pays the widow of an intestate a debt due the deceased, and she afterwards administers, the letters relate back and legalize the payment.

MCADAM, Ch. J.—The rule is elementary that where the debtor pays the widow of an intestate the amount of a debt due the deceased, and she afterwards administers, the letters relate back and legalize the payment (2 *Hill*, 225; 8 *Johns.* 126; 1 *Williams on Ex'rs*, 240, 396-7; *Farrell's Est.*, 1 *Tucker*, 110; and see cases cited in appellant's brief in 49 *N. Y.* 229).

Judgment for defendant, with costs.

Cox v. Flagler.

City Court.

Trial Term—June, 1887.

COX *against* FLAGLER ET AL.

Usury is a crime ; but a mere intention, not followed by execution or attempt at consummation, does not constitute crime. An intention to exact \$25 bonus on a loan, expressed the night before the loan was made, is not usury, if when the loan is actually made no unlawful interest is actually reserved or taken.

Motion for new trial on judge's minutes.

MCADAM, Ch. J.—Whatever the understanding was the night before, the loan made was not usurious. The plaintiff loaned \$300 on the note in suit for that amount. No interest was reserved or taken, and the agreement as executed is free from any vice. The intention, expressed the night before making the loan, to charge \$25 bonus, was not executed, nor was there any attempt at its consummation. Usury is a crime ; but a mere intention, not followed by execution or attempt at consummation, does not constitute crime (5 *Cranch*, 312). The fact that illegal interest was neither reserved or taken or even demanded repels the idea that usury entered into the contract finally made. Intention is an emotion of the mind, best evidenced by acts and declarations, and acts control the determination of the question. "If a party does an act which defrauds another, his declaring he did not by the act intend to defraud another is weighed down by the evidence of his act" (*Babcock v. Eckler*, 24 N. Y. 632). The evidence by the defendant that the plaintiff said he intended to reserve \$25 as a bonus is, under this rule, best negatived by the fact that he did not reserve or take

Peck v. Mulvihill.

anything for the loan. The contract sued upon is free from any taint of usury, and the debtors may discharge their full liability by returning the money loaned (*Tyler on Usury*, 217; *Bill v. Fish*, 1 *St. R.* 473).

The verdict is right, and the motion for a new trial must be denied.

City Court.

Special Term—October, 1887.

PECK ET AL. against MULVIHILL.

Where a watch is worn merely as an ornament, and used only on special occasions, it may be reached on supplementary proceedings against the owner.

MCADAM, Ch. J.—In *Merriam v. Hill* (1 *Week. Dig.* 260) this court held that where a watch is necessary to the prosecution of the employment through which a judgment debtor earns his livelihood, it cannot be reached or taken by or through supplementary proceedings, notwithstanding the fact that the debtor is a single man. This is the law to-day, but inapplicable to the present case, because the debtor's own evidence proves that the watch is not at all necessary for his support. He wears it as an ornament, and only on special occasions when dressed up; at other times it is allowed to run down, and remain unused. It has evidently nothing whatever to do with his means of livelihood. The fact that it was a present from his mother does not affect the legal question involved. The watch is his property, and how it became his is immaterial to the present inquiry.

A receiver will, therefore, be appointed, and the watch must be delivered over.

First Nat. Bank v. Dowie.

City Court.

*Trial Term—December, 1887.*FIRST NATIONAL BANK, &c., *against* HARRY
DOWIE, JR.

Check.—Mistake.—Rescission.—One O. drew his draft whereby he requested the defendant to pay to the order of R. Lamb, cashier, &c., \$500. The payee sent the draft to the plaintiff as agent for collection. The draft was presented to the defendant's book-keeper, who filled up a check on the New York National Exchange Bank in favor of the plaintiff for \$500. The check was given to the plaintiff's messenger. Shortly afterwards, the defendant discovered that the check had been drawn to pay O.'s draft. He thereupon stopped payment of his check, and telegraphed the plaintiff that the check had been given by mistake, and that payment had been stopped. The plaintiff said, "All right, send up the draft, and we will return the check." The defendant thereupon returned the draft. *Held*, that the check did not operate as a payment of the draft, and that the plaintiff having acquiesced in the defendant's claim that there was a mistake, and in this way repossessed itself of the draft, the plaintiff could not recover on the check.

Trial by the court without a jury.

J. Overtalser, at Bellefontaine, Ohio, drew his draft whereby he requested the defendant to pay to the order of R. Lamb, cashier, &c., the sum of \$500. The payee sent the draft to the plaintiff herein as agent for collection. The draft was presented to the defendant's book-keeper, who filled up a check on the New York National Exchange Bank in favor of the plaintiff for \$500. The defendant signed the check, and his bookkeeper gave it to the messenger of the plaintiff, who in exchange for it gave him the draft. Shortly after the delivery of the

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check the defendant was for the first time informed that the check had been drawn to pay the draft. He thereupon stopped payment of the check at his bank, and telephoned the plaintiff that the check had been given by mistake, and that payment had been stopped. The plaintiff answered, "All right; send up the draft, and we will return the check." The defendant thereupon returned the draft, so that the plaintiff has both check and draft. The action is on the check.

Peabody, Baker & Peabody, for plaintiff.

Estes, Barnard & Olendorf, for defendant.

MCADAM, Ch. J.—The surrender of the draft was in the first instance a good consideration for the check, but the action of the plaintiff, when it was informed of the defendant's mistake and act, destroyed the effect of the exchange made. The plaintiff acquiesced in the defendant's claim that he had made a mistake, and consented to rectify it if he would return the draft. The defendant thereupon returned the draft, and the acceptance of it effectually rescinded what had previously been done (*Coon v. Reed*, 1 *Hill*. 511; *Collins v. Brooks*, 20 *How. Pr.* 32). The giving of the check did not pay the draft; nothing short of payment of the check could operate as payment of the draft (*Burkhalter v. Second National Bank*, 40 *How. Pr.* 324). The defendant did not intend to pay the draft; he made a mistake, which the plaintiff consented to rectify. The plaintiff accepted a return of the draft, and ought to have returned the defendant's check. The plaintiff has lost nothing by the act of the defendant, nor has it in consequence altered its position. The defendant testified that he had no funds belonging to the drawer of the draft; on the contrary, that the drawer was indebted to him. While the payee of the draft is presumably a *bona fide* holder thereof for value, and the plaintiff, as

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trustee of an express trust, represents such holder, there is nothing implied from this circumstance that requires the defendant to accept or pay the draft against his will. The equities are all with the defendant, and he is entitled to judgment.

City Court.

Trial Term—February, 1888.

HENRY J. BEHRENS, JR., AS PRESIDENT OF THE NON-PAREIL ROWING CLUB, *against* CHRISTIAN MILLER.

Unless there is a likelihood that a breach of the peace will be committed, or that the sparring is in the nature of a prize-fight, it is not illegal at an athletic entertainment, and the police have no right to stop it.

Where the owner of a hall lets it for an athletic entertainment, and refuses to permit it to be held, because he has failed to procure a renewal of his license to let the hall for theatrical purposes, the measure of damages is the difference between the probable profits, to be proved with reasonable certainty, and the expenses proved.

The plaintiff sued to recover damages for a breach of contract, by which the defendant, the proprietor of "Turn Hall," let it to the plaintiff for an athletic entertainment, to be held on the evening of December 14, 1886. The affair was extensively advertised, and sparring and gymnastics formed a feature of it. On the evening when it was announced to come off great crowds had collected about the door, seeking admission, which the defendant refused, because his theatrical license from the mayor had expired December 1, and had not been renewed. The question of law arising upon the trial was disposed of by McADAM, Ch. J., in his charge to the jury, as follows.

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G. Welch, for plaintiff.

C. Steckler, for defendant.

McADAM, Ch. J. (*inter alia*), charged the jury that unless there was a likelihood that a breach of the peace would be committed, or that the sparring was in the nature of a prize-fight, the police had no power to interfere with the proposed entertainment; that sparring forms part of the physical education of students in our best colleges, and that, legitimately exercised, it is innocent pastime, and assists the body as intellectual exercises assist the mind.

There was, therefore, nothing in the proposed entertainment which was of an illegal nature, and its character forms no defense to the action. The real difficulty is that the defendant had failed to obtain the renewal of his theatrical license, and could not, therefore, open his hall. This is the reason the defendant assigned, and is no doubt the only one why the plaintiff was deprived of the hall on the night in question. This does not excuse the defendant from the performance of his contract. He knew the character of the entertainment the plaintiff intended to give, and should, if he had fears about obtaining a renewal of his license, have made the hiring conditional upon obtaining it. He did not do this, and, however innocent his intentions, he must make the plaintiff's loss good. Upon the question of damages, the court charged that the plaintiff is entitled to the profit it would have made if the entertainment had been allowed to go on; and this profit must be ascertained by the jury to a reasonable certainty from the evidence. 1037 fifty-cent and 107 seventy-five-cent tickets were distributed, and these, if sold, would have realized \$598.75. The actual expenses, which proved to be \$180, must of course come out, and this would leave an apparent loss of profit amounting to \$418.75. I do not tell you that this amount

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of loss has been proved—it has not; but you are to say, from the evidence of the actual sales made, and what would in all reasonable probability be made, what the profit would have been, giving the defendant the benefit of all reasonable doubt on the subject, and allowing the plaintiff only for the actual loss you are satisfied it suffered. The proof shows that there was a large crowd at the door seeking admission tickets on the night in question. This crowd has been variously estimated from one hundred and fifty to five hundred or six hundred. You may give this evidence such weight as it deserves, in aiding you to arrive at a satisfactory conclusion.

The jury found in favor of the plaintiff for \$125.

Damages for Breach of Contract to Deliver a Lecture.

“Bob” Ingersoll agreed to deliver a lecture under the direction of the plaintiff, who was to have the sale of, and the money received for the admission tickets. The defendant was to have \$250 for his services. He failed to attend pursuant to the agreement, and the plaintiff sued for damages. The court held that a party to a contract may recover as damages the loss of the benefits and gains he would have realized from its performance; and that in this case the evidence was such that the amount of profits lost by the plaintiff was not too uncertain, as it tended to show that if the defendant had performed his agreement the plaintiff would have realized from the sale of admission tickets a sum equal to the amount of the verdict (\$102) over and above the sum he agreed to pay to the defendant, and the expenses incident to the lecture, and that the damages were, therefore, the direct result of the breach; and the judgment was affirmed (*Savary v. Ingersoll*, 46 *Hun*, 176).

Morgan v. Regensberger.

City Court.

Special Term—December, 1887.

ALEXANDER C. MORGAN; EXECUTOR, &C., *against*
M. H. REGENSBERGER.

Where money is deposited by a debtor with a third person with directions to apply it in payment of a debt, without any communication to, or understanding with the creditor, no trust is created which the creditor can enforce.

Where, however, money is deposited by C. with R. to pay C.'s creditors, and the latter assent to it, and become privy to the arrangement, a valid trust is created for their benefit, which they may enforce against R.

Motion by defendant to vacate order of arrest.

M. H. Regensberger, for motion.

H. R. Squier, opposed.

MCADAM, Ch. J.—The \$1,500 was deposited by Cohen, and accepted by the defendant for the purpose of paying Cohen's creditors. Thus far, there is no dispute. There are two theories after this point—one presented by the defendant, and the other by the plaintiffs. The defendant's theory is, that Mr. Cohen deposited the money under the mistaken theory that it was sufficient to pay some preferred debts in full, and thirty per cent. in composition to the balance of his creditors; that he was acting exclusively for Cohen, and subject to his orders, and not under any valid trust to creditors; and finding there was only \$382.17 in his hands to pay \$935.57, he declined to continue the payments, and consequently

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refused to pay the plaintiffs. If this theory be correct, the plaintiffs have no cause of action.

The plaintiffs, on the other hand, have, according to their theory, a valid cause of action, and a legal ground for the defendant's arrest. They claim that after the \$1,500 was deposited by Cohen, and accepted by the defendant, the *pro-rata* share of each creditor was fixed, the creditors assented to it, and became privy to the arrangement. If this be so, a valid trust was thereby created for their benefit, which they have the power to enforce. The fund from thenceforth became the property of the creditors, and Cohen lost all control over it. The defendant became possessed of, and held the fund in a fiduciary capacity, and the failure to pay it over to the creditors entitled to it gave each of them a cause of action for his proportionate share, with the right to the provisional remedy of arrest for money received in a fiduciary capacity (Roberts v. Prosser, 53 N. Y. 260).

In addition to the consent, the plaintiff's papers show that a release of their claim was delivered to the defendant, and that he promised to pay their demand. The case is, therefore, clearly distinguishable from one in which a fund is placed by a debtor in the hands of a third person with directions to apply it in payment of a debt, without any communication with the creditor, or understanding between them to that effect (Seaman v. Whitney, 24 Wend. 260; Neilson v. Blight, 1 Johns. Cases, 205); for, in such a case the fund is under the control and direction of the depositor, who may change its disposition at will. Not so under the plaintiff's theory, for the fund was deposited under an understanding with the creditors, and the depositor parted with all control or direction over it (Exchange Bank v. Rice, 107 Mass. 37; 9 Am. R. 1). If the plaintiff's theory be correct, the fact that it now appears that the fund remaining in the defendant's hands is insufficient to pay all the creditors the stipulated thirty per cent., does not excuse the defendant from the

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performance of his trust. If the defendant had devoted the fund among those who became privy to the trust, they could have been satisfied in full. Besides this, the defendant cannot keep the fund by remaining passive. He must execute his trust, or be relieved from it by some lawful method.

While strongly impressed with the case presented by the plaintiffs, it is possible that on the trial, the plaintiffs may fail to establish their allegation to the satisfaction of the jury, or they may find that the defendant's theory of the contention is right, and that he is justified in withholding payment from the plaintiffs.

As the action is one which affects the liberty of the citizen, I will give the defendant the benefit of the doubt, and vacate the order of arrest, without costs, and upon the defendant stipulating not to sue.

When one person enters into a contract with another to pay money to a third person, or to deliver some valuable thing, and such third party is the only one interested in the payment or the delivery, he can release the promisor from performance or compel performance by suit. If, on the other hand, a debt already exists from one person to another, a promise by a third person to pay such debt is for the benefit of the original debtor to whom it was made, and can only be released or enforced by him.

The following are among the cases in which it has been held that a promise to pay the debt of a third person may be enforced directly by the original creditor. (1) When money or property is placed in the hands of the promisor for the particular purpose of paying the debt, and his promise rests upon that fact. (2) When the promisor has bought out the stock of a tradesman, and undertaken to take the place, to take the contracts, and to pay the debts of his vendor. In these cases, as well as the cases of one who receives money or property on the promise to pay or deliver to a third person, said third person, though not a party to the contract, may be fairly said to be a party to the consideration on which it rests. The promisor is virtually turned into a trustee, and said third person may, therefore, sue in his own name. But when the promise is made to and in relief of the original debtor upon a consideration moving from him, no particular fund or means of payment being placed in the

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hands of the promisor, out of which the payment is to be made, there is no trust arising in this promisor, and no title passing to the third person which he can assert by suit.

A firm becoming insolvent confessed to A., who was an accommodation indorser for them to the extent of \$40,000, a judgment of \$25,500, upon which A. issued execution. In consideration of this judgment A. promised the firm to pay all their existing debts without regard to their number or amount. B., who was a creditor of the firm, subsequently brought suit in his own name against A. upon this agreement to recover the amount owing to him by the firm.

Held, that as no fund was specially provided for the payment of plaintiff's debt, and no property set apart for his benefit, he was not entitled to maintain an action against A. on the alleged contract, either in his own name or in the name of the firm to his use.

Held, therefore, that the defendant was entitled to judgment (Supreme court of Pennsylvania, 21 *Weekly Notes*, 125).

City Court.

Trial Term—March, 1888.

FRANCIS D. BRIGHT, ET AL., *against* WALTER A. DEAN.

Where a vendor agrees to ship a number of boat-loads of coal, to be paid for as each load is delivered, and the vendee refuses to pay for the first boat load after delivery, the vendor is not liable for not delivering the balance. The vendor may in such case elect to treat the contract as rescinded, and recover the value of what has been delivered.

The action is on a past-due promissory note made by the defendant, and delivered to the plaintiffs for \$1,541.30. The answer sets up no defense to the note, but pleads as a counter-claim the breach of two independent contracts, one made April 6, 1886, for the delivery of six boat-loads of coal of 182 tons each, payable thirty days after delivery.

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The answer alleges the delivery of five of said boat-loads and a refusal to deliver the remaining one boat-load, to the defendant's damage, as it is alleged, of \$171. The second contract was made August 17, 1886, for the delivery of eight boat-loads of coal, payable in like manner. Five of the eight loads were delivered, and three were not, to the defendant's damage, as it is alleged, of \$513. The plaintiffs in reply admit the making of the contracts, as alleged by the defendant, and the breach thereof as charged, but deny that any damage resulted to the defendant in consequence, and plead as an excuse for the breach, that the defendant, in and by the contracts aforesaid, agreed to pay for said coal within thirty days after the delivery of each of said boat-loads; that he failed to make payments in accordance with this understanding, whereupon the plaintiffs elected to consider the contracts terminated, and notified the defendant that they would deliver no more coal in pursuance thereof. The dispute, therefore, arises in reference to the counter-claim, and not as to the plaintiff's cause of action. On April 28, 1887, by an order duly entered, it was directed that the action be severed, and that plaintiffs have judgment against the defendant for \$838.10, the part of the plaintiffs' claim admitted by the pleadings, and that the action be continued against the defendant for the remainder of the claim, if the plaintiffs elected to continue the same. The plaintiffs did so elect, and the action was continued as to the \$720.90, which is put in dispute by the counter-claim.

Schenck & Punnett, for plaintiffs.

T. U. Cantine, for defendant.

MCADAM, Ch. J.—The defendant claims that the plaintiff's failure to deliver the four boat-loads of coal constitutes such a breach of their contracts as entitles him to the damages which form the subject of his counter-claim.

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The solution of this question requires inquiry into the terms of the sale to ascertain whether the non-delivery was owing to inexcusable neglect on the part of the plaintiffs, as imputed by the defendant, or to the breach of some prior obligation on the part of the defendant, amounting to a condition precedent to such delivery, as asserted by the plaintiffs. The evidence, viewed in the light of the course of delivery between the parties, and their correspondence and acts, proves that the understanding was that the coal was to be delivered one boat-load at a time, to be paid for within thirty days after the delivery of the bill of lading therefor. The correspondence is significantly strong upon this subject, and fully bears out the construction which the plaintiffs have put upon the contracts. When a boat-load was delivered, and thirty days were allowed to go by without payment, the defendant treated himself as in default, and added the interest from the time the thirty days expired. He did not claim that he was not in default until all the coal was delivered, but computed the thirty days from the time of each separate delivery. Assuming this finding of fact to be correct, it is easy to apply the law. The rule is, that if there has been a special contract, and the plaintiff has performed a part of it, according to its terms, and been prevented by the act, default, or consent of the defendant from performing the residue, he may recover compensation for the work actually done, or for goods actually delivered, and the defendant cannot set up the special contract to defeat him.

Thus, in *Withers v. Reynolds* (2 B. & Ad. 882), which was an action for not delivering straw according to the following agreement: "John Reynolds undertakes to supply Joseph Withers with wheat straw delivered at his premises until June 24, 1830, at the sum of 33s. per load of thirty-six trusses, to be delivered at the rate of three loads in a fortnight; and the said J. W. agrees to the said J. R. 33s. per load for each load so delivered

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from this day till June 24, 1830, according to the terms of this agreement." It appeared that the plaintiff had refused to pay for the straw upon delivery, and it was contended that he was not bound to do so, and that, as no time was named for the payment, he might defer it till the expiration of the contract, or that, at all events, the promises to deliver the straw, and to pay for it were independent, and should be enforced by cross-action. But the court held that the vendor had a right to be paid *toties quoties* on the delivery of each load, and that the plaintiff's refusal to do so gave the vendor a right to rescind the contract, and that the plaintiff was properly nonsuited. The court in that case put its decision upon the special wording of the contract "for each load so delivered," &c., or otherwise, the delivery of the whole might have been considered a condition precedent to the right to recover any compensation. The parties hereto evidently intended that the construction placed upon the contract in the case cited should govern the contracts made by them. Their acts and correspondence clearly demonstrate this, and their intention must control the interpretation. It would seem clear that if A. agrees to sell to B. ten tons of coal, to be paid for as each ton is delivered, and B., after receiving the first ton, declines to pay for it, that A. may sue, and recover for that ton without averring or proving a tender of the other nine, upon the principle that, although the promises are mutual, and A.'s promise to deliver the first ton a condition precedent to his right to recover anything, yet B.'s promise to pay for the first ton on delivery may be regarded as a condition precedent to his right to demand any further delivery under the contract. B.'s failure clearly put him in default, and precludes him from complaining that A. has not performed his part of the contract. A., on the other hand, not being at fault, may either treat the special contract as rescinded, and recover the value of the one ton delivered, or he may sue upon the special con-

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tract, and recover the agreed price of that ton, and his loss of profit on the other nine. No vendor is obliged to trust a vendee further than the terms of sale give him credit. Courts must enforce the terms agreed upon by the parties, and cannot substitute others for them to which the parties might not have assented at the time the contract was entered into. In the *Canal Company v. Gordan* (6 Wall. 561), it was held that in a contract to make and complete a structure, with agreements for monthly payments, a failure to make a payment at the time specified is a breach which justifies the abandonment of the work, and entitles the contractor to recover a reasonable compensation for the work actually performed (see also *R. R. Co. v. Spank*, 24 Ill. 588). The failure to perform was in these cases deemed equivalent to a consent to the rescission of the contract, on which the party not at fault was authorized to act. This seems to be consistent with reason and justice; for no person should be allowed to take advantage of his own wrong or neglect, or screen himself from payment for what has been done for his benefit, by a tortious failure or refusal to perform his part of the contract, when such failure or refusal may have caused the very condition of affairs with which he is finding fault. The application of these rules to the findings of fact in this case disposes of the defendant's counterclaim, and proves it to be without merit. Another feature of the case which militates against the defendant is, that after the alleged breach he made and delivered to the plaintiffs the note in suit, by which he acknowledged an indebtedness to them of \$1,541.30. The contracts alleged to have been left unperformed by the plaintiffs were made in April and August, 1886. The note was made by the defendant, January 20, 1887—long after the breaches complained of. No claim for damages was made then, and the giving of the note is *prima facie* evidence of an accounting and settlement of all demands between the parties, and that the maker was indebted to the plaintiff upon

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such settlement to the amount of the note (*Lake v. Tysen*, 6 N. Y. 461).

Upon the entire case, the plaintiffs are entitled to judgment for \$710.90, the balance due, with \$38.70 interest, aggregating \$749.60, with costs.

Affirmed on appeal by the general terms of the city court and common pleas.

City Court.

Special Term—May, 1888.

CLEMENT *against* GRANT.

Severance of Action as to Principal and Interest.—Interest is a mere incident of the principal, and, as a necessary consequence, follows it. An action cannot be severed so as to allow judgment for the principal, and permit it to be prosecuted for the interest alone.

MCADAM, Ch. J.—The plaintiff sues for \$72.70, with interest from January 5, 1888. The defendant admits the debt, and relies for his defense on a plea of tender. The dispute arose over a trifling claim of interest. The plaintiff now moves that the action be severed, that he be allowed judgment for the principal, \$72.70, and proceed (if he so elects) for the trifling demand for interest. The answer to the application is that the interest is a mere incident of the principal, and, as a necessary consequence, follows it (1 *City Ct. R. Suppl.* 47). The interest cannot be separated from the principal so as to permit the action to be prosecuted for the interest alone (*Code*, § 511). As the tender pleaded was not kept good by payment into court (61 N. Y. 317), the plaintiff may take judgment for the \$72.70 admitted to be due, with costs, but without costs of this motion. In other respects, the plaintiff's application must be denied.

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The Receipt of the Principal bars all Claim for Interest.

Interest is an incident to the debt ; and if the principal be paid, the interest falls with it, unless there is an express contract respecting interest. In other words, a suit will not lie for the recovery of interest by itself, after the payment of the principal, unless there has been an actual contract to pay interest (*Dixon v. Parks*, 1 *Espinasse*, 110 ; *Jacob v. Emmet*, 11 *Paige*, 142 ; *Tillotson v. Preston*, 8 *Johns*. 229 ; *Johnston v. Brannan*, 5 *Id.* 267 ; *Stevens v. Barringer*, 13 *Wend.* 639 ; *Lake v. Eddy*, 15 *Id.* 76 ; *Central R. R. Co. v. Maravia*, 61 *Barb.* 180 ; *Gillespie v. Mayor*, 3 *Ellw. Ch.* 512 ; 1 *Bouv. L. Dict.* 657 ; *Cowen Tr.* 646, 4 ed. ; *Riley v. Maxwell*, 4 *Blutchf.* 237 ; *Tenth Nat. Bank v. Mayor*, 4 *Hun*, 429 ; affirmed, 80 *N. Y.* 660).

The reason for the rule seems to be that interest, being a mere incident, cannot exist without the debt, and, the debt being extinguished, the interest is extinguished also.

The same principle has been applied to costs after the payment of the principal (*Bendit v. Annesley*, 42 *Barb.* 192). So, where railroad shares are transferred after interest has accrued thereon, the right to the accrued interest passes by the assignment. The stock is the principal, and the interest merely the incident, and follows the former (*Sloan v. N. Y. W. & R. R. Co.*, 1 *City Ct. Suppl.* 47).

City Court.

Special Term—May, 1888.

BROWN, EXECUTOR, v. MOTTELER.

Averments as to the representative character of an executor or administrator are unnecessary where the cause of action accrues after the death of the testator.

MCADAM, Ch. J.—The provision of the Code (§ 1814) declaring that an action by an executor, or administrator, “upon a cause of action belonging to him in his representative capacity” must be brought by him in that capacity, includes only such causes of action as accrued

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during the lifetime of the decedent, or are founded on a contract made by him (*Buckland v. Gallup*, 105 N. Y. 453. See cases cited in *Mayo v. Austin*, 2 City Ct. 113). An action upon a demand accruing to the personal representative, through a disposition of the funds or property of the estate after the decease of the testator or intestate, may be brought by him in his individual capacity (*Ib.*).

The word "executor" in the title of the action may be regarded as surplusage (45 N. Y. Super. Ct. 517; 1 Hun, 49; *aff'd*, 58 N. Y. 621; 2 City Ct. 113). The plaintiff is, therefore, entitled to judgment on the demurrer, with costs, and with leave to the defendant to withdraw the demurrer, and answer over on payment, within three days, of \$20, the trial fee of an issue of law.

New York Supreme Court.

Special Term—May, 1889.

VON PROCHAZKA *against* VON PROCHAZKA.

Referee's Fees.—A referee may charge a reasonable fee for considering the matter before him, and for making his report.

BARRETT, J.—The two days when referee was at Jefferson Market on subpoena must be stricken out. Half fees should suffice where adjournment was taken. The charge for preparing report and consideration is reasonable. There should thus be allowed \$102 for sessions when testimony was taken; \$60 for adjournments; and \$25 for consideration and report. Deducting \$50 already paid, there is a balance due of \$137. The defendant must pay this, and permit the taking up of report within ten days.

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One O. drew his draft whereby he requested the defendant to pay to the order of R. Lamb, cashier, &c, \$500. The payee sent the draft to the plaintiff as agent for collection. The draft was presented to the defendant's bookkeeper, who filled up a check on the New York National Exchange Bank in favor of the plaintiff for \$500. The check was given to the plaintiff's messenger. Shortly afterwards, the defendant discovered that the check had been drawn to pay O.'s draft. He thereupon stopped payment of his check, and telegraphed the plaintiff that the check had been given by mistake, and that payment had been stopped.

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- The plaintiff, a widow, forty-six years of age, who had buried two husbands, sued the defendant, who was her junior in years, for breach of promise to marry. There was no allegation of seduction, and no proof that the defendant owned any property or had any wealth. *Held*, that under such circumstances, it could not be claimed that the plaintiff's prospects were blighted, her fond hopes crushed, or her proud spirit broken. Her age and condition would indicate that she had arrived at that time of life when disappointment becomes the rule rather than the exception; and that a verdict for \$2,500 was excessive. *Poser v. Kahrs*92
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- Where the defendant agreed with two others to purchase at auction in his own name, but on joint account of the three, certain wire-cloth, the funds for the purchase being furnished by the three, and the defendant subsequently sold the cloth and received the proceeds,—*Held*, that the three were not partners, and that the two might maintain separate actions at law against the defendant to recover their respective shares of the proceeds. *Dusenbury v. Cantlon*.....99
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LEASE—

Where a lease is made for two years with the privilege of renewal, and the tenant in due time serves the requisite notice of an election to take the renewal, the original lease is thereby continued in force for the new term. No formal renewal instrument is necessary. When the lease is renewed the tenant is liable for the rent, whether he occupies the premises or not; but with regard to steam power which the defendant was to receive, the rule is different. The actual loss to the landlord in consequence of the tenant's failure to receive the steam power is in such a case the basis of compensation, and this must be proved. *Sherwood v. Gardner*.....64

An undisclosed principal may sue in his own name upon a parol contract made in the name of the agent, providing it creates obligations and gives remedies which are mutual; but where an agent executes a lease in his own name as landlord, for a longer term than one year, in a manner not authorized, and the act in consequence does not bind his principal, the latter cannot in turn enforce any liability upon it against the tenant. *Fougera v. Cohn*.....253

Leases for a longer period than one year must be subscribed by the landlord or his agent thereunto duly authorized by writing.
Ib.

A seal is not necessary on a lease for a term of one year or more.
Ib.

See LANDLORD AND TENANT.

LEGATEE—

See EXECUTRIX.

LIBEL—

See EXAMINATION BEFORE TRIAL.

LIEN—

See STABLE-KEEPER.

LIMITATION—

Statutes of limitations as applicable to legal representatives or heirs at law. Section 392 of the Code of Civil Procedure does not apply to a case where an executor or administrator qualifies shortly after the death of the decedent. When the statute of limitations has once attached, it is not revived by this section. *Hunt v. Peake*.....26

The statute of limitations operates on the remedy merely, and does not extinguish the debt; and a payment on account revives the remedy, whether it be made before or after the statute has attached. *Anthony v. Herzberg*.....165

Lodge Benefits—Master and Servant.

LIMITATION—Continued.

The defendants were partners, and plaintiffs dealt with them as a firm. The firm dissolved, and one of the defendants, in the name of the firm, made a new promise in writing. *Held*, that as the plaintiffs had no notice of the dissolution, both defendants were liable. *Talbot v. Rechlin*.....420

LODGE BENEFITS—

See **BENEVOLENT SOCIETY**.

MALICIOUS PROSECUTION—

See *Corporation*..... 59

In order to maintain an action for malicious prosecution, the plaintiff is required to prove that the proceeding was instituted without probable cause, and was malicious. *Moses v. Dickinson*..... 184

The question of probable cause depends upon the prosecutor's belief, based upon reasonable grounds, such as would lead a discreet person to the belief that a crime had been committed. *Ib.*

MANUFACTURE—

Contracts for the delivery of goods to be manufactured are contracts for the sale of merchandise within the statute of frauds, unless the goods are to be manufactured by the vendors themselves. *Fox v. Schloss*..... 182

MARGINS—

See **BROKER**.

MARINE CASES—

Assault by master..... 4

MARRIAGE—

In this State an uncle may lawfully marry his niece. The Legislature has left the subject to the wisdom and good sense of the parties interested *In re Williams*..... 148

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See **DAMAGES**.

MARSHAL—

Liability for taking property or replevin..... 151

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MASTER AND SERVANT—

Liability of master for injury to servant. *Beatty v. Hepman*.. 4

The master is not liable for a criminal prosecution set on foot by his credit clerk, without proof that the master either authorized

 Master of Vessel—Negligence.

MARSHAL—*Continued.*

it in the first instance or approved of it afterward. *Moses v. Bates*..... 59

A salesman employed "to travel through the southern part of the United States," and to follow the instructions of the persons "thus employing him," cannot be required against his will to travel through other territory, and refusal so to do does not authorize his discharge *Pepper v. Kisch*..... 131

See CORPORATION ; NEGLIGENCE.

MASTER OF VESSEL—

Liability of..... 161

MEMBER OF ASSEMBLY—

Exemption of from process..... 351

MERCHANDISE—

Suit, when maintainable on order for..... 241

MISDEMEANOR—

Arrest by private person for..... 236

MISTAKE, MONEY PAID BY—

The plaintiff by mistake paid a sum of money to redeem defendant's premises from a tax sale. The defendant promised to repay plaintiff the sum paid, and the action was founded on this promise. *Hell*, that the promise was valid, and the action maintainable. The plaintiff need not prove the regularity of the tax or the sale. *Sauford v. Wheeler*..... 227

When a person demands money of another as a matter of right, and he pays it with full knowledge of the facts on which the demand is founded, or with the means of information at hand, and without fraud or deceit, he can never recover back the sum he has so voluntarily paid. *Campbell v. Vandervoort*..... 315

MONEY HAD AND RECEIVED—

See MISTAKE.

MORTGAGE—

The defendant owned a second mortgage on certain real property.

The plaintiff's assignors purchased the property, subject to the mortgage, but did not assume its payment. The defendant signed an agreement to take off ten per cent. from the face of their mortgage. The plaintiff's assignors thereafter conveyed the property, and the vendee paid the balance due on the mortgage without exacting the deduction of ten per cent. *Held*, that the action could not be maintained. *Goldberg v. Rouse*..... 61

NEGLIGENCE—

While a parent is not liable for the tortious or negligent acts

Negligence.

NEGLIGENCE—*Continued.*

of his minor children, he is liable if he negligently leaves a loaded revolver in an unlocked bureau drawer in a room in which his minor children are allowed to play, if one of them, not knowing the danger, takes the pistol and inflicts injury upon the person or property of another. The ground of liability is the negligence of the parent. *Phillips v. Barnett*..... 20

See PARENT AND CHILD ; LANDLORD AND TENANT.

The plaintiffs occupied the sub-cellar of premises No. 68 Reade street. The Dixon Crucible Co., who were landlords of the plaintiffs, occupied the basement and first floors of said premises. The defendants and two tenants of theirs occupied the second floor. There was a stop-cock in the basement occupied by the Crucible Co., which, when shut off, effectually prevented the Croton water from entering the building. The Crucible Co. were in the habit of shutting off this stop-cock on closing their business for the day. On the Saturday before the overflow occurred, the Crucible Co. failed to perform this duty, and the water ascended to the second story, occupied by the defendants, and in consequence overflowed. There was a stop-cock on the floor occupied by the defendants, who, not being apprised of any danger, never shut it off, relying upon the custom of the Crucible Co. of shutting the water off in the basement. If the stop-cock on the defendants' floor had been shut off, the overflow would not have occurred. *Held*, that these facts did not *per se* prove negligence on the part of the defendants, and that they were not liable for the overflow. The reasons stated.

Clarke v. Anderson..... 115, 229

The plaintiff, a workman in defendant's employ, was excavating on the defendant's land so near his neighbor's lot that the wall upon the neighbor's land fell into the excavation and injured the plaintiff, who sued his employer to recover damages. *Held*, that as the danger was not within the peculiar knowledge of the defendant, but alike apparent to the plaintiff and defendant, and as either might have foreseen it by the exercise of ordinary intelligence, the plaintiff was guilty of contributory negligence, and could not recover. In other words, there was mutual and co-operating negligence on the part of both master and servant which deprived the latter of any remedy against the former.

Parker v. Totten..... 155

Where the evidence fairly raises the question whether an explosion of cartridges was caused by contact with a steam-pipe under the charge of the defendant's employe, and by reason of

Notary Public—Nuisance, Covenant Against.

NEGLIGENCE—*Continued.*

his negligence, or by spontaneous combustion originating from a defect in the manufacture, the question presented is one of fact for the jury; and, where there is evidence sustaining the former conclusion in preference to the latter, a verdict of the jury against the defendant, holding him liable for negligence, will not be disturbed. *Rollins v. Farley*..... 176

A tenant residing in a tenement house fell down stairs and sued the landlord on the ground that it was his duty to light the gas in the lower hall and that she fell because he failed to perform that duty. *Held*, that she could not recover. *Hildebrand v. Schenck*..... 249

To make the owner of a dwelling out of possession liable to the occupant for an overflow or leakage from water-pipes, it is necessary to prove that the owner interfered in some way with the management of the premises by making repairs and doing them negligently, or the like. An owner is not liable for injuries caused by defective pipes unless there be some defects in their construction. *Zenner v. Newman*..... 310

NOTARY PUBLIC—

Books as evidence..... 1

NUISANCE, COVENANT AGAINST—

The parties made an agreement for the exchange of certain real property. They agreed to convey the property "free from all incumbrance," except a mortgage which was to be assumed. The deed which the defendant held for his property contained a covenant against nuisances, and, on the day for closing the contract, the plaintiff refused to take title, on the ground that the covenant aforesaid constituted an incumbrance. *Held*, that the covenant against nuisances was an incumbrance on the property, as it restricted its use, and that the plaintiff was entitled to recover \$100 damages, that being the sum which the party in default stipulated to pay to the other. *Van Derminden v. Essig*.... 38

How construed..... 411

Negligence must be determined by what was known before and at the time of the accident, and not by subsequent facts; in other words, it must be decided upon the facts as they existed at the time of the injury. Special damages must be alleged as well as proved. *Schmitt v. Dry Dock R. R. Co.*..... 359

Persons who co-operate in an act directly causing injury are jointly liable for its consequences, if they acted in concert in causing a single injury. But persons who act separately, each causing a separate injury, cannot be made liable, even though the injuries

Offers to Allow Judgment—Parent.

NUISANCE, COVENANT AGAINST—*Continued.*

thus committed are all inflicted at one time, and precisely similar in character. Where separate injuries are so committed, the proximate cause of both is liable for all the damages. *Mooney v. Third Ave. R. R. Co.*..... 366

Proximate and remote cause 373

Of driver, when imputable to passenger..... 382

Privity in..... 383

Duty to light hallways..... 413, 417

Servant assumes known dangers..... 413

Contributory negligence defined..... 419

A servant always takes the risk of "known dangers," and risks which are patent need not be called to his attention. The plaintiff, an employe of the defendants, fell down stairs, and was injured. He attributed the fall to the want of lights in the hallway. *Held*, that as no lights had ever been used in the hallway, and the danger was patent, no recovery could be had. Observation is notice, or supplies notice—which is, in effect, the same thing. *Michaels v. Levison*..... 411

The owner, lessee or occupant of a tenement is under no legal obligation to keep lights in the hallways of the house, nor to maintain hand-rails. The absence of lights or hand-rails does not prove negligence. *Hulpin v. Townsend*..... 417

The defendant, who is a builder, was employed by Mrs. Salter, the tenant, to make certain repairs to the house she occupied. The defendant sent some of his men to make such repairs as Mrs. S. directed. While making the repairs, the men sent by the defendant opened a grating in front of the basement door, and the plaintiff, a servant employed by Mrs. S., fell through into the cellar below and was severely injured. The question of negligence was submitted to the jury, as was also the question whether the men were acting under the immediate direction of the defendant or of Mrs. S. The jury having found for the plaintiff,—*Held*, that the verdict must be sustained; that the men who opened the grating were employees' of the defendant, and he is liable for their negligence. *O'Connell v. Hill-yard*..... 28

OFFERS TO ALLOW JUDGMENT—

How construed..... 153

OVERFLOW OF WATER—

See NEGLIGENCE; PLEADINGS.

PARENT—

Liability for torts of Infant..... 21

 Partners—Principal and Agent.

PARTNERS—

Neither an action nor a counter-claim can be maintained at law by one partner against another growing out of an unsettled partnership relation. The remedy is in equity. *Lobenthal v. Keller* 304
 Jurisdiction..... 99

PARTNERSHIP—

Liability of special partner..... 64

PARTY-WALL—

Opinion of Professor Dwight as to..... 320
 A contract to pay for the use of a party-wall is personal to the builder, and does not pass to his grantee by a conveyance of the property. The contract to pay is also personal to the party contracting to pay, and is not discharged by his conveyance of the property, nor by the grantee's assumption of liability, or by the fact that the grantee used the wall. *Squier v. Townsend*.... 142

PAYMENT—

See ADMINISTRATRIX; PRINCIPAL AND AGENT.

PLEADINGS—

Where an owner not in occupation is sued for an overflow of water by a tenant in possession, the complaint ought to allege facts, showing specifically the breach of duty making the owner liable.

Va vis v. Tompkins..... 407

A plea of payment is supported only by proof of payment in money or its equivalent *Jennings v. Osborne*..... 195

The plaintiff sued the defendant as the indorser of a promissory note made by one D. S. James, to the plaintiff's order. *Held*, that an answer alleging that the note was indorsed for the plaintiff's accommodation set up a good defense; and that, owing to the peculiar phraseology of the note, the plaintiff ought to have alleged facts which made the defendant liable as first indorser.

MacTeague v. James..... 52

When a contract has been terminated by the employer against the will of the contractor, the latter may waive the contract and bring his action on the common counts for work and labor generally

Pleadings should be liberally construed to uphold a judgment, and amended, if need be, to conform to the facts proved, if no injustice result therefrom. *Gerhardt v. Amman*..... 104

Averments as to the representative character of an executor or administrator are unnecessary where the cause of action accrues after the death of the testator. *Brown v. Mottelet*..... 439

PRINCIPAL AND AGENT—

The plaintiffs did business under the name of "The Railway Map and Publishing Co." The defendant gave one Taunton an order

Principal and Interest—Protest.

PRINCIPAL AND AGENT—*Continued.*

in the company's name for 1,500 pamphlets. The contract was on an official blank of the company's on which the name of B. C. Prescott appeared as general manager, and S. D. L. Taunton as superintendent. There was a printed memorandum on the head: "Make all checks payable to the order of B. C. Prescott." Taunton collected the entire bill from the defendant in installments in money and checks, some of the checks being made to the order of Prescott and some to the order of Taunton. Taunton subsequently absconded, and the plaintiffs sued to recover the amount of the checks payable to Taunton's order, claiming the amount as a balance due on the contract, on the ground that Taunton had never accounted to the plaintiffs for the money.

Held, that the payment to the superintendent was under the circumstances a good payment to the plaintiffs. *Bridgman v.*

Troubridge 139

Undisclosed principal, liability of. *Note*..... 161

Act of agent on sale. *Ultra Vires. Note*.....80

See BROKERAGE AND BROKERS ; SET-OFF.

PRINCIPAL AND INTEREST—

Interest is a mere incident of the principal, and, as a necessary consequence, follows it. An action cannot be severed so as to allow judgment for the principal, and permit it to be prosecuted for the interest alone. *Clement v. Grant*.....438

PRIVILEGED COMMUNICATION—

See EVIDENCE.

PROBABLE CAUSE—

How far reversal of judgment affects. *Note*.....188

PROHIBITION—

If a justice has jurisdiction of summary proceedings he cannot be prohibited from adjudging upon the questions involved, and it cannot be presumed that he will announce an erroneous judgment. The question of prohibition, considered. *People v.*

3d District Court.....163

POOR PERSON.....175

PROMISSORY NOTES—

See BILLS ; CHECKS.

PROTEST—

Notice of dishonor of a promissory note was given to the indorser in an informal way, on a card deposited in his postal-box. The defendant received the card. The trial judge refused to let the plaintiff go to the jury on the question whether the card was sufficient to carry to the defendant knowledge of

Proximate Cause—Replevin.

PROTEST—*Continued.*

the protest of the note in suit. *Held*, error, and that the question should have been submitted. *Held*, also, that when a note falls due on Saturday, July 3, and the national holiday is celebrated on Monday, the 5th, a notice deposited on the 6th was timely. *Betts v. Cox*.....31

PROXIMATE CAUSE—

What is.....373

QUESTION OF FACT—

Denial of all knowledge or recollection by a party who, in the nature of things, ought to know whether a fact alleged be or not, creates a question of fact, as much so as a positive denial of the fact. *Knubel v. Flintolitic G. and M. Co.*.....354

REAL ESTATE SECURITY—

The term defined.....347

REAR HOUSE—

What is, within the meaning of a covenant.....341

RECEIPT IN FULL—

Not conclusive.....350

RECEIVER—

A receiver appointed in supplementary proceedings cannot sell real estate, nor can the debtor be compelled to make a transfer of the real estate to the receiver unless it be situated in another State. *Pfluger v. Cornell*.....145

RESCISSION OF CONTRACT—

By making new one.....127

REFEREE'S FEES—

A referee may charge a reasonable fee for considering the matter before him, and for making his report. *Von Prochazka v. Von Prochazka*.....440

REMOTE CAUSE—

Definition of.....373

REPAIR—

Covenant to.

See LANDLORD AND TENANT.

REPLEVIN—

Ordinarily, possession of property obtained by means of legal proceedings, and by due course of law, does not render the persons so possessing themselves wrongdoers in any sense which makes them guilty of conversion, either in taking or maintaining the possession which the law has given them. Proceedings in claim and delivery against a bailee generally conclude the bailor, by reason of the privity existing between them. *Byrne v. Crooks*.....148

Res Adjudicata—Security.

RES ADJUDICATA—

See FORMER ADJUDICATION.

SALE—

Where the terms are agreed upon, the broker should reduce them to writing in the form of bought-and-sold notes. He cannot (unless the parties consent) vary the terms agreed upon by sending to the contracting parties notes containing other terms. The effect of discrepancy between the note sent the vendor and that sent the vendee, considered. *Northfleet C. & B. Co. v. Build.*.....97

Contracts for the delivery of goods to be manufactured are contracts for the sale of merchandise within the statute of frauds, unless the goods are to be manufactured by the vendors themselves. *Joy v. Schloss.*.....132

The plaintiffs, who do business at Paducah, Kentucky, sold to the defendant a fire-proof safe, No. 87, for which he agreed to pay \$400 in cash and a second-hand safe then in the defendant's store at Cincinnati. The 87 safe was sent on to Cincinnati. The contract was made at the defendant's store in Cincinnati, and the delivery of the second-hand safe was to be made there. The plaintiff suffered the second-hand safe to remain in defendant's store until a fire occurred which destroyed the building and its contents, including the second-hand safe. The present action was to recover the value of said safe. *Held*, that title to the second-hand safe had passed to the plaintiffs, that the risk attends the title and not the possession, and that the defendant was not liable. *Hull's S. & L. Co. v. Reike.*.....271

See WAGERS.

Where a vendor agrees to ship a number of boat-loads of coal, to be paid for as each load is delivered, and the vendee refuses to pay for the first boat-load after delivery, the vendor is not liable for not delivering the balance. The vendor may in such case elect to treat the contract as rescinded, and recover the value of what has been delivered. *Britt v. Dean.*.....438

SATISFACTORY—

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SECURITY—

Taken from person arrested. See ARREST.

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Seduction—Staying Proceedings.

SEDUCTION—

The action of a seduction is based on mere loss of service, but this is eminently a legal fiction. Proof of the slightest loss of service, or the most trifling injury, if the direct result of the act, is sufficient to uphold the action. *Leloup v. Eschausse*..55

SET OFF—

Against undisclosed principal.....288

SEVERANCE—

See PRINCIPAL AND INTEREST.

SOCIETIES—

See BENEVOLENT SOCIETIES.

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Not illegal.....427

SQUATTER—

Where one without title or permission enters into and builds upon the lands of another, he becomes a squatter and may be proceeded against as such; or, if he maintains the possession, thus obtained, by force, he may be proceeded against for forcible detainer. What constitutes adverse possession. *Suydam v. Wood*.....23

STABLE-KEEPER'S LIEN.—

The statute giving a livery-stable-keeper a lien is a remedial one, and must be liberally construed to advance the remedy. It was intended to give a lien where none existed before. An inchoate lien attaches from the moment the horses enter the stable. It is waived if the statutory notice be not given, and it ripens into an effective lien the moment the required notice is given, and relates back and embraces all charges due. *Oyle v. King*.....83

STATUTE OF FRAUDS—

See MANUFACTURE AND SALE; ACCEPTANCE.

STATUTE OF LIMITATIONS—

See LIMITATIONS.

STAY—

An application for leave to discontinue is in the nature of a petition to the court for relief, and does not violate an order staying plaintiff's proceedings. *Rorke v. Domestic S. M. Co.*....359

STAYING PROCEEDINGS—

An action will not be stayed because the costs of a former action were not paid, unless the causes of action are identical. *Beemer v. McCoy*.....236

By non-payment of costs stays aggressive proceedings only. *Ramkal v. De Abrisquesta*.....303

 Stipulation—Supplementary Proceedings.

STAYING PROCEEDINGS—*Continued.*

Where the action is *in forma pauperis*, it cannot be stayed on account of the non-payment of costs awarded against the plaintiff in a previous action. *Herbert v. Drake*.....175

STIPULATION—

The defendant stipulated to try the cause on June 26, or suffer an inquest. He failed to appear on that day, and moved to open the default on the ground that he was out of town on that day, and could not be present. *Held*, no excuse. *Root v. Goodspeed*.....173

STOCKHOLDER—

A stockholder of a corporation, created under the general manufacturing act, is not personally liable unless the debt contracted by the corporation is payable within one year. He is not liable for rent under a lease to the corporation, having two years and more to run. *Goff v. Whitney*.....256

SUMMARY PROCEEDINGS—

See PROHIBITION ; LANDLORD AND TENANT ; SQUATTER ; INJUNCTION.

A grantee of lands may as such maintain summary proceedings to recover possession of the premises for non payment of the rent due subsequent to the grant, and may in the same proceeding include a demand for prior rent assigned to the grantee by the grantor. *Ottinger v. Prince*.....353

SUMMONS—

Fee for service.....404

SUPPLEMENTAL ANSWER—

A supplemental answer pleading a general release, should be allowed only on payment of all costs to date of the application. *Julio v. Equitable L. A. Co*.....301

SUPPLEMENTARY PROCEEDINGS—

An affidavit in supplementary proceedings should allege that the defendant is a resident or has a place of business within the county—either is sufficient. If the plaintiff proceeds on both grounds he must do so in the conjunctive. *Kellogg v. Freeman*.....147

The validity of an execution cannot be inquired into on the return of an order in supplementary proceedings. The remedy is by special motion. *Greenlick v. Rose*.....174

Where an order to examine a debtor is founded on the fact that he resides in this county, and the debtor moves to vacate it on the ground that he resides in another State,—*Held*, that as in either

 Tender—Trust Funds.

SUPPLEMENTARY PROCEEDINGS—*Continued.*

case the plaintiff was entitled to the order, the motion must be denied. *Vredenburg v. Beaumont*..... 298

See RECEIVER.

TENDER—

Where the creditor refuses to receive the payment, the necessity for a tender is dispensed with. If a tender is refused on a specific ground, no other can be urged against it. *Cromwell v. Burr*..... 6

TORT-FEASORS—

Joint and several, liability of.....371, 378

TRUST—

Where the mother of six children directed the defendant to deposit in bank to their credit an amount of money, and the defendant executed the direction by depositing the money in a bank in his name in trust for the children,—*Held*, that a valid and irrevocable trust was thereby created. *Rode v. De Young*..... 101

Where money is deposited by a debtor with a third person with directions to apply it in payment of a debt, without any communication to, or understanding with the creditor, no trust is created which the creditor can enforce. Where, however, money is deposited by C. with R. to pay C.'s creditors, and the latter assent to it, and become privy to the arrangement, a valid trust is created for their benefit, which they may enforce against R. *Morgan v. Regensberger*..... 430

TRUST FUNDS—

S. B. V. opened an individual account with the Bowery Savings Bank. He was at that time executor of the estate of his father, Abraham Valentine. S. B. V. afterward departed this life, and the envelope containing the bank-book was indorsed, "Trust funds belonging to the accounts of Charles E. Valentine, Mary Jane Valentine, and John H. Valentine, with Samuel B. Valentine, Ex. and Trustee." Charles E. Valentine, some years before the deposit was made, executed an assignment to the plaintiff of all his interest in Abraham Valentine's estate. It was claimed that the fund on deposit was part of the accumulated income from Abraham's estate, which, by the deposit and indorsement on the envelope, was specifically set apart for the said Charles E. Valentine, and, consequently, passed by his assignment to the plaintiff. *Held*, that on the facts stated, no title passed in the deposit to Charles E. Valentine, or to his assignee. It is doubtful whether a trustee can create a trust in funds held by him in trust. *Wheeler v. Bowery S. Bk.*.... 392

 Trustees—Warrant.

TRUSTEES—

See JUDGMENT AGAINST.

USURY—

Notes given on gambling transactions are declared void by statute, but if they are transferred to an innocent holder, and while in his hands the note is renewed, the taint of illegality is removed, and the innocent holder may recover on the new note, although he could not have recovered on the original note. *Seventh Ward Nat. Bk. v. Newbold*..... 125

Destroying old and making new contract..... 127

Usury is a crime; but a mere intention, not followed by execution or attempt at consummation, does not constitute crime. An intention to exact \$25 bonus on a loan, expressed the night before the loan was made, is not usury, if when the loan is actually made no unlawful interest is actually reserved or taken. *Cox v. Flagler*..... 423

Defendant applied to plaintiff for a loan of \$1,000. Plaintiff had the money on deposit in a savings bank, and told the defendant that if he withdrew it, he would lose \$13, accrued interest thereon, which he could not collect from the bank. The defendant agreed to pay the \$13 and legal interest for the use of the money. *Held*, that the transaction was not usurious, and that a further agreement, made in good faith, to take the lender into the defendant's employ, did not render the loan *per se* usurious. *Washburn v. Rider*..... 127

VESSEL—

The master of a vessel, as general agent of the owners, has authority in the home port to bind them by his contract for necessities. An undisclosed principal is not liable if the goods were charged to the agent, and the principal, in ignorance that any claim is made on him, pays the demand to the agent. *Daly v. Monroe*. 160

WAGER CONTRACT—

A contract of purchase, where the parties intend that the property shall not be delivered, but that settlements shall be had, at appointed times, of the differences in value, based on the rise or fall of the market, is void. *Fleet v. Weinberg*..... 421

WARRANT—

The defendant obtained a warrant for the arrest of one Clarke for keeping a disorderly house, and for the arrest of "all vile and improper persons found on the premises,"—this being the usual form of warrant in such cases. The plaintiff was arrested by the police under this warrant. *Held*, that as he was not named in it, the defendant was not liable. *Grab-net warrants condemned*. *Briggs v. Berls*..... 171

Warranty—Witness.

WARRANTY—

Where a contract of sale is executed, there is no implied warranty as to quality. If the contract is executory, and the goods are to arrive, a different rule attaches. But even where the goods are to arrive, the warranty implied by the law must be reasonable, and the purchaser must bear the risk of deterioration which is necessarily consequent upon the transmission. The value of English currency is fixed by statute. *Perkins v. Harrison*. 111

On sale of iron..... 47

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WATER OVERFLOW—

See NEGLIGENCE.

WITNESS—

A witness subpoenaed by *duces tecum* may be relieved by the court from producing unnecessary books. *Pond v. Solomon*..... 300

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